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IN THE

Supreme Court of the United States

PAT O'LEAR, DONALD RITTERING, KAY ANN CHASE, STEVE BORRELLO, LAWRENCE KESTENBAUM, JAMES LARKIN, BARBARA LONG, GEORGE GAINES, MINNIE H. WHITING, AND CHRISTOPHER SMITH,

Appellants,

v.

CANDICE S. MILLER, CHRISTOPHER M. THOMAS, THE MICHIGAN REPUBLICAN PARTY, PATRICK MILLER, ANDREW PETTRESS, AND JAMES L. PALASKE,

Appellees.

On Appeal from the United States District Court for the Eastern District of Michigan

JURISDICTIONAL STATEMENT

F. THOMAS LEWAND
R. CRAIG HUPP
WILLIAM B. FORREST III
BODMAN, LONGLEY & DAHLING LLP
100 Renaissance Center
Thirty-fourth Floor
Detroit, Michigan 48243
(313) 259-7777

PAUL M. SMITH
Counsel of Record
SAM HIRSCH
MARC A. GOLDMAN
JAMES A. TRILLING
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Counsel for Appellants

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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QUESTIONS PRESENTED

1. Whether the District Court erred in effectively concluding that members of a major political party may never state a claim of unconstitutional partisan gerrymandering, thereby nullifying this Court's decision in *Davis v. Bandemer*, 478 U.S. 109 (1986).

2. Whether a State presumptively violates the Equal Protection Clause when it subordinates all traditional, neutral districting criteria to the overarching goal of drawing a congressional redistricting map that achieves maximum partisan advantage for members of one political party.

3. Whether a State exceeds its power under the Elections Clause, Article I, Section 4 of the Constitution, when it draws congressional district boundaries that ensure that candidates belonging to one political party will receive a supermajority of the State's congressional seats even if that party wins substantially less than a majority of the statewide vote.

PARTIES TO THE PROCEEDING

Appellants are Pat O'Lear, Donald Rittering, Kay Ann Chase, Steve Borrello, Lawrence Kestenbaum, James Larkin, Barbara Long, George Gaines, Minnie H. Whiting, and Christopher Smith. Appellees are Candice S. Miller, Secretary of State for the State of Michigan; Christopher M. Thomas, Director of Elections for the State of Michigan; the Michigan Republican Party; Patrick Miller; Andrew Pettress; and James L. Palaske.

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IN THE

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Appellees.

On Appeal from the United States District Court for the Eastern District of Michigan

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The District Court's opinion and order dismissing Appellants' Article I claim with prejudice and their Equal Protection Clause claim without prejudice is reprinted at J.S. App. 1a-19a. The District Court's order *sua sponte* dismissing the latter claim with prejudice is reprinted at J.S. App. 20a-22a. Neither order has been published.

JURISDICTION

The three-judge District Court's final order dismissing Appellants' claims for injunctive relief from an alleged partisan gerrymander was entered on June 5, 2002. Pursuant to 28 U.S.C. § 2101(b), the notice of appeal was timely filed

within 60 days, on August 2, 2002. J.S. App. 23a-25a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS INVOLVED

The Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Section 2 of Article I of the Constitution provides in part: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ." The Elections Clause of Article I, Section 4 of the Constitution provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

STATEMENT OF THE CASE

Appellants, who are Democratic voters from Michigan, appeal the dismissal by a three-judge Federal District Court of their claims that Michigan's newly enacted congressional redistricting plan is so biased in favor of Republicans that it constitutes an unconstitutional "partisan gerrymander." The ruling below is one of a series of lower-court decisions since *Davis v. Bandemer*, 478 U.S. 109 (1986), holding that it is not enough for plaintiffs to show that a districting map severely "packs" and "fractures" voters of one political party and thus disproportionately favors candidates of another party. Although far from consistent with one another, these decisions have all required plaintiffs to prove some harm in addition to the harm caused by a severely biased redistricting map – for example, proof that members of the disfavored political party are being barred from organizing and campaigning for candidates, or a showing that the candidates of the party favored by the map, when elected, would

completely ignore constituents aligned with the disfavored party. Such an approach means that partisan gerrymandering, while justiciable in theory, is immune from legal challenge in actual practice, no matter how extreme the bias that is introduced into a districting scheme. Recognizing that reality, lawmakers have "pushed the envelope" of partisan bias in the post-2000 round of redistricting, with Michigan's map being just one of the most extreme. It is essential that this Court undertake plenary review in this case to make clear that the harms caused by partisan gerrymandering are not wholly beyond judicial redress.

In a mirror image of the pattern long prevalent throughout much of the South, Michigan voters today lean somewhat Democratic in federal elections and slightly Republican in state elections. J.S. App. 43a-44a. When the results of the 2000 census were released in 2001, Republicans narrowly controlled both chambers of the Michigan Legislature as well as the governorship, while Democrats held both U.S. Senate seats and nine of the State's sixteen congressional seats. *Id.* 3a, 16a. Over the last decade, while control of the Legislature oscillated between the two parties, Democrats prevailed in every presidential and senatorial election in Michigan – and in three of those six contests, the Republicans failed to garner even 40% of the statewide vote. *Id.* 43a.[1]

In the summer of 2001, Republicans sought to convert their momentary advantage at the state level into a decade-long windfall at the congressional level. They passed a new congressional redistricting plan on almost perfect party-line

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[1] Michigan Democrats have won 8 of the last 9 U.S. Senate elections and a majority of votes cast statewide in 13 of the last 14 U.S. House elections. *See* Clerk of the House of Representatives, *Statistics of the Congressional Elections* (biennial reports for 1974 to 2000), *available at* http://clerk.house.gov/members/election_information/elections.php.

votes, with only one Republican (and no Democrats) defecting. *Id.* 29a-30a, 32a, 38a-39a, 48a. The 2001 Plan "paired" six Democratic Representatives into three districts, forcing them to retire from Congress or square off in Democratic primary fights; but it gave each of the seven Republican incumbents his own safe seat. *Id.* 45a-46a. Although the State was losing a congressional district due to relatively slow population growth in the 1990s, the 2001 Plan created two "open" (*i.e.*, incumbent-less) districts designed to elect specific Republican candidates (one of whom is the State's chief elections officer and an Appellee in this case). *Id.* 30a, 45a-46a.

Statistical analyses of past election results confirm that 14 of the 15 districts in the 2001 Plan will be effectively noncompetitive in November 2002 and likely for the next decade – with nine districts almost certain to go Republican and five almost certain to go Democratic. *Id.* 27a, 44a-47a. Because the Plan's one competitive district also tilts Republican (absent any incumbency effects), the new districting scheme ultimately will produce a 10-to-5 Republican advantage even if Democrats continue to capture a majority of the congressional ballots cast statewide. *Id.* 3a, 27a, 46a-47a. In Michigan's most recent presidential and senatorial elections, Democratic candidates Al Gore and Debbie Stabenow both prevailed, yet each carried only 5 of 15 districts under the 2001 Plan. *Id.* 44a-45a. That pattern – with competitive Democratic candidates typically winning only 5 of 15 districts – was verified by an expert analysis of the 27 most recent statewide elections. *Id.* 46a. As the court below put it, "[d]espite the increasing majority of Democratic voters in Michigan, Republicans are likely to win ten of Michigan's fifteen congressional seats under the challenged plan." *Id.* 3a.

Furthermore, the 2001 Plan sacrificed compliance with state law for raw partisanship, as it violates the exacting requirements set forth in the Congressional Redistricting Act of 1999, Mich. Comp. Laws § 3.63(c), *reprinted at* J.S. App. 74a-76a; *see id.* 30a-34a. The Legislature had enacted the 1999 law at a time when it was unclear whether one party would control the 2001 redistricting process. J.S. App. 31a. To constrain partisan manipulation, the 1999 Act codified a strict hierarchy of specific neutral districting criteria, giving particularly high priority to minimizing the number of county and municipal boundaries broken by congressional district lines. *Id.* 74a-76a; *see id.* 31a; *see also Good v. Austin*, 800 F. Supp. 557, 560-67 (E.D. & W.D. Mich. 1992) (three-judge court) (describing the traditional criteria that the 1999 Act codified).

In the summer of 2001, Democrats in the Legislature introduced an alternative redistricting plan that broke fewer county and municipal boundaries than did the Republicans' 2001 Plan and that lacked the partisan bias and noncompetitiveness that marred the 2001 Plan. J.S. App. 31a-32a, 47a-49a. Nonetheless, the Legislature, on party-line votes, rejected the alternative map and instead enacted the 2001 Plan – while expressly reaffirming, but reinterpreting, the 1999 Act's neutral criteria. Mich. Comp. Laws § 3.54, *reprinted at* J.S. App. 77a-79a; *see also* J.S. App. 32a-33a. Democrats then unsuccessfully introduced a second alternative plan that better satisfied the governing criteria, even as reinterpreted. *Id.* 41a-42a, 48a-49a.

Three voters (none of whom is a party here) filed suit in the Michigan Supreme Court alleging that the 2001 Plan violated the 1999 Act by needlessly splitting their counties and municipalities. *Id.* 42a. At oral argument, Appellees conceded that the Democrats' second alternative plan broke fewer county and municipal boundaries than did the

Republicans' 2001 Plan. *Id.* 87a; *see id.* 41a-42a. But the court held that the criteria enacted in 1999 and reenacted in 2001 were unenforceable. *LeRoux v. Secretary of State*, 640 N.W.2d 849, 860-64 (Mich. 2002).

In addition to its substantive problems, the 2001 Plan's enactment was, in the District Court's words, marked "by a host of procedural defects." J.S. App. 4a; *see id.* 14a, 34a-43a. Seizing advantage of their narrow, but disciplined, majorities, the Republican leaders of the Michigan Senate and House of Representatives rammed the 167-page bill containing the 2001 Plan through both chambers in a matter of days. *Id.* 35a-39a; *see id.* 38a-39a (describing how the House committee's sole hearing ended at 11:00 p.m. and the House passed the bill that night at 2:35 a.m.).

The rushed process successfully squelched public (and bipartisan) deliberation and led to two serious substantive errors. *Id.* 34a-43a. Specifically, one district turned out to be noncontiguous (a defect cured by amendment the next day, immediately before the Legislature adjourned for the summer); and the plan as a whole violated the principle of "one person, one vote," as 4,578 Michiganders were not assigned to *any* of the State's 15 congressional districts. *Id.* 39a-40a. By the time the second error was discovered, the Legislature was on summer recess and sending the bill back for amendment in the fall would have opened it to precisely the kind of public scrutiny that the rushed process was designed to avoid. *Id.* 39a-41a. After several embarrassing news reports and a handful of meetings with the Republican leadership, the Secretary of the Senate opted to "fix" the mistake unilaterally. *Id.* 40a. She sent the revised bill to the Governor, and he signed it at 4:54 p.m. on September 11, *id.* 40a-41a – apparently seeking to minimize further adverse news coverage.

The Justices of the Michigan Supreme Court – divided along partisan lines – upheld the validity of the enactment even though the bill passed by the Legislature on July 11 differed from the bill signed by the Governor on September 11. *LeRoux*, 640 N.W.2d at 856-60 (interpreting MICH. CONST. OF 1963 art. 4, §§ 1, 26, 33); *see id.* at 864-69 (Kelly, J., dissenting).

While the *LeRoux* plaintiffs' state-law challenges to the 2001 Plan were pending in the Michigan Supreme Court, the Federal District Court deferred consideration of Appellants' federal-law claims, which primarily alleged that the 2001 Plan was a partisan gerrymander that would frustrate the will of the majority for the next 10 years, in violation of the Equal Protection Clause and of Article I, Sections 2 and 4. J.S. App. 53a, 70a-73a. In the federal action, Appellees conceded that the Michigan Legislature had acted with unconstitutionally discriminatory *intent*, but asserted that Appellants' complaint should be dismissed because Appellants had failed to allege sufficiently severe *effects*. *Id.* 6a.

The federal court held a hearing, postponed the deadline for congressional candidates to file nominating petitions, and established an expedited schedule for discovery and briefing, leading to a three-day trial on May 21 to 23. On May 15, the court issued an order reaffirming its modification of the election calendar and stating that the Appellants had demonstrated "a likelihood of success on the merits of their claim, or a portion thereof, of unconstitutional political gerrymandering." *Id.* 82a. But that same day, the court issued an order canceling the trial. *Id.* 84a-85a.

On May 24, the District Court dismissed Appellants' first amended complaint, but authorized them to refile a complaint limited to their equal-protection claim, if they could satisfy requirements the court spelled out. *Id.* 2a. Following the court's guidance, Appellants promptly

clarified the basis for their equal-protection claim in a second amended complaint, *id.* 26a-51a, which the District Court then dismissed with prejudice *sua sponte* on June 5, 2002. *Id.* 20a-22a.

In analyzing Appellants' equal-protection claim, the District Court explained that *Bandemer* established three elements for a cognizable claim of partisan gerrymandering: plaintiffs "must prove '[1] intentional discrimination [2] against an identifiable political group and [3] an actual discriminatory effect on that group.'" J.S. App. 5a (quoting *Bandemer*, 478 U.S. at 127 (plurality opinion)). The District Court acknowledged that Appellants' complaint "easily satisfied" the first two elements and, as to the third element, "alleged disproportionality in abundance." *Id.* 6a, 14a. But the District Court held that the complaint failed to satisfy the third element – "an actual discriminatory effect" sufficient to violate the Equal Protection Clause – because in addition to evidence of "abundan[t]" disproportionality between votes and seats, Appellants needed to allege at least one of three "'other indicia'" of political powerlessness. *Id.* 7a, 14a (quoting *Bandemer*, 478 U.S. at 143 n.21 (plurality opinion)). The three "other indicia" were:

(1) that the 2001 Plan would result in Democrats being essentially "shut out" of, and completely excluded from, the political process. *Id.* 9a-10a, 13a. As examples of such "complete exclusion," the court cited proof that African-Americans in certain locales in the 1960s and early 1970s were "'not allowed to register or vote [or] choose the political party they desired to support . . . [or] be included among the candidates slated by the Democratic Party.'" *Id.* 12a (citation omitted); *see also id.* 10a n.4 (describing partisan interference with "'registration, organizing, voting, fund-raising, or campaigning'") (citation omitted). The court did not explain how a congressional redistricting plan could

deprive one party's voters of their rights to register or organize or cast ballots or raise campaign funds.

(2) that Republican Members of Congress elected under the 2001 Plan would be "indifferent" to the interests of Democratic citizens. *Id.* 10a-13a. Appellants' second amended complaint alleged that Republican Representatives elected from strongly Republican districts will be "indifferent to the dissenting views" and will likely "ignore the interests" of their Democratic constituents. *Id.* 27a (¶ 1), 47a (¶ 56). The complaint further alleged that the noncompetitive nature of 9 of the 10 Republican-leaning districts would encourage their Representatives to ignore Democratic voters' views and to be generally less responsive in providing constituent services. *Id.* 47a (¶ 57). The court nonetheless rejected Appellants' claim because they had failed to allege that "their interests will in fact be '*entirely* ignore[d]' by their representatives." *Id.* 22a (quoting *id.* 11a) (emphasis added; brackets in original). In so holding, the court latched on to two "admissions" in the second amended complaint: first, that Republican Representatives would likely respond to some "'requests for assistance'" from Democratic constituents; and second, that Republican Representatives would likely "'listen'" to the views expressed by some Democratic constituents. *Id.* 22a (quoting *id.* 47a (¶ 57)). Thus, Republican Representatives would neither be *wholly* indifferent to, nor *entirely* ignore, the interests of their Democratic constituents. *Id.* 9a-13a, 22a.

(3) that Democrats "have no chance of obtaining more favorable congressional districts in the next reapportionment," which presumably will occur in 2011. *Id.* 13a; *see also id.* 8a (asking whether a party "had 'no hope' of improving its fate in the next reapportionment") (citation omitted). The *possibility* that by 2011 Democrats might

control a chamber of the Michigan Legislature, *id.* 21a; *cf. id.* 46a-47a, or the governorship, *id.* 8a-9a, suggested to the court that a "political solution" is "within reach by the next decade" and therefore the discriminatory effects of the 2001 Plan lacked the "substantial permanency" necessary to violate the Equal Protection Clause. *Id.* 8a, 21a.

The District Court's rejection of Appellants' Article I claim was even more sweeping. Although the Elections Clause of Article I, Section 4 expressly delegates to "each State . . . Legislature" the power to prescribe the "Places and Manner of holding Elections for . . . [United States] Representatives," U.S. CONST. art. I, § 4, cl. 1, the District Court held that the Michigan Legislature's power to divide the State into congressional districts "does not stem from Section 4" and thus Section 4 "has no role to play." J.S. App. 15a. The court also held that Section 2 of Article I had no bearing on partisan gerrymandering. *Id.* 15a n.6. Therefore, the District Court reasoned, the gerrymandering of a State's congressional districting plan – no matter how severe, permanent, and detrimental to effective majority rule – can never violate Article I of the Constitution. *See id.* 15a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This Court held in *Davis v. Bandemer*, 478 U.S. 109, 118-27 (1986), that partisan gerrymandering claims are justiciable. That decision was a watershed. Prior to *Bandemer*, the only judicially enforced constitutional limit on political discrimination in redistricting was the "one person, one vote" mandate. But as Justice Harlan observed in 1969, the rule "of absolute [population] equality is perfectly compatible with 'gerrymandering' of the worst sort. A computer may grind out district lines which can totally frustrate the popular will on an overwhelming number of critical issues." *Kirkpatrick v. Preisler*, 394 U.S. 542, 551 (1969) (Harlan, J., dissenting); *see also Karcher v. Daggett*,

462 U.S. 725, 776 (1983) (White, J., dissenting) ("There is now evidence that Justice Harlan was correct to predict that '[e]ven more than in the past, district lines are likely to be drawn to maximize the political advantage of the party temporarily dominant in public affairs.'") (citation omitted). By recognizing a limit to political discrimination in redistricting other than the rule of population equality, *Bandemer* promised to check partisan gerrymandering, which Justice White deemed "a far greater potential threat to equality of representation." *Karcher*, 462 U.S. at 776 (citation and internal quotation marks omitted).

That promise, as the District Court's decision demonstrates, has yet to be realized. It is difficult to imagine a more egregious partisan gerrymander than the 2001 Plan, a map that jettisons the neutral districting criteria twice enacted by the Michigan Legislature, so that one political party can win two-thirds of the State's congressional seats even if it receives less than half of the popular vote. The degree of partisan skew in this case goes far beyond that of the map challenged in *Bandemer* itself. But despite this Court's clear indication in *Bandemer* that state legislatures may not consign political majorities to minority status, and despite Appellants' very specific allegations that the 2001 Plan would accomplish that goal, the District Court held that Appellants had failed to state a valid claim.

The District Court enunciated a test for unconstitutional partisan gerrymandering that clearly conflicts with *Bandemer*. Application of that test renders it impossible for voters affiliated with a major political party to state a political-gerrymandering claim, because it requires them to plead and then prove *not only* severe bias in a districting map *but also* at least one of three "other indicia" of political powerlessness, none of which in practice can ever be proved.

But there has never been a clearer need for some enforceable limit on the ability of legislators to dilute the voting power of a class of citizens based on their political viewpoint. In the sixteen years since this Court decided *Bandemer*, advances in political data-gathering and computer technology have made it increasingly easy for legislatures to gerrymander with surgical precision, excising and shifting just a few politically undesirable voters at a time. As a result, in the current round of redistricting, legislators in a number of key States, including Michigan, Pennsylvania, and Florida, have drawn congressional district maps with remarkable levels of partisan bias.[2] In so doing, they have simultaneously undermined any assumption that partisan gerrymandering is a "self-limiting enterprise" because efforts to maximize partisan advantage will cut the margins too thin, weakening a party's safe seats and exposing its own incumbents to greater risks of defeat. *See Bandemer*, 478 U.S. at 152 (O'Connor, J., concurring in the judgment). In Michigan, Appellants' expert statistical analysis indicated that none of the 9 heavily Republican districts in the 2001 Plan had even a one-out-of-ten chance of going Democratic in the November 2002 elections. And nationally, the post-2000 round of redistricting has produced the fewest competitive seats in more than 200 years of congressional history.[3] Today, partisan gerrymandering is no longer a self-

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[2] An appeal from the dismissal of partisan-gerrymandering claims in the Pennsylvania case has been docketed as *Vieth v. Jubelirer*, No. 01-1873.

[3] *See, e.g.*, Editorial, *Democracy Denied*, RICHMOND TIMES-DISPATCH, Mar. 17, 2002, at E2 ("Precision redistricting – *i.e.*, gerrymandering – has made 380 districts safe for one party or the other. Citizens will cast ballots in November, but their votes effectively were counted when the pols drew the lines."); Juliet Eilperin, *House Democrats' Climb Gets Steeper: Party Lacks Rallying Cry as Redistricting, Incumbency Cut Competitive Races*, WASH. POST, Apr. 2, 2002, at A1 ("A decade ago, there were roughly 100 competitive races following redistricting; this year there will be 30 to 40, perhaps even fewer . . . ."); *see also* Alison

limiting enterprise, and enforcement of *Bandemer* is more important than ever.

The Court should take this opportunity to clarify that extreme partisan gerrymandering is not only justiciable in theory but remediable in actual practice. Recent decisions by this Court help clarify the appropriate standard for identifying an unconstitutional partisan gerrymander. *First*, this Court has held that a districting plan is presumptively unconstitutional if the mapmakers allowed racial considerations to predominate over all neutral districting principles. *See Shaw v. Reno*, 509 U.S. 630 (1993) (overreliance on racial considerations in redistricting presumptively violates the Equal Protection Clause); *Miller v. Johnson*, 515 U.S. 900 (1995) (same). Following the logic of these decisions, it is presumptively unconstitutional under the Equal Protection Clause for a State to subordinate all neutral districting principles to the predominant aim of maximizing partisan advantage.

Second, the Court has made clear that, in the context of *congressional* – as opposed to state-legislative – redistricting, Article I of the U.S. Constitution imposes more stringent limits on the power of the state legislatures to manipulate electoral outcomes. States may not use their power to regulate federal election procedure to dictate electoral outcomes, to advantage one class of candidates over another, or to frustrate the will of the majority of voters. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); *Cook v. Gralike*, 531 U.S. 510 (2001). The same principles require stringent limits on the power of legislatures to

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Mitchell, *Redistricting 2002 Produces No Great Shake-Ups*, N.Y. TIMES, Mar. 13, 2002, at A20 ("With Congressional redistricting almost complete, the once-a-decade redrawing of the nation's political map is turning out to favor incumbents to an unusual degree, making many of the House's swing seats into safer territory for one party or the other.").

predetermine the results of congressional voting through strategic line-drawing.

The errors committed below in this case, and in other cases like it, demonstrate a pressing need for this Court to clarify and enforce the constitutional norm it first announced in *Bandemer* – a norm necessary to ensure fairness and competition in congressional elections.

I. THE DISTRICT COURT ERRED IN ITS INTERPRETATION OF *BANDEMER*.

The controlling plurality opinion in *Davis v. Bandemer* established that a plaintiff who alleges "intentional discrimination against an identifiable political group and an actual discriminatory effect on that group" states a claim of unconstitutional political gerrymandering. 478 U.S. at 127. While *Bandemer* recognized that there is no guarantee of proportional representation in our winner-take-all political system, it also recognized that there is a difference between a redistricting plan that results in moderately disproportionate representation and a plan designed to ensure that a party that wins a *majority* of the vote statewide will win far less than a majority of the seats for an entire decade. Thus, *Bandemer* emphasized three factors in assessing whether discriminatory effects are unconstitutional: (1) the likely severity of the partisan skew; (2) the likely duration of the skew; and (3) whether that skew is sufficient to prevent a majority of the voters from exercising control. *See id.* at 133 (plurality opinion). The Court explained that, to make out a claim of partisan gerrymandering, a plaintiff must show that "the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively," and that this showing can be "supported by evidence of continued frustration of the will of a majority of the voters." *Id.* In other words, redistricting should achieve "a level of parity between votes and representation sufficient

to ensure that significant minority voices are heard and that majorities are not consigned to minority status," in keeping with "our general majoritarian ethic and the objective of fair and adequate representation." *Id.* at 126 n.9 (majority opinion) (citing *Reynolds v. Sims*, 377 U.S. 533 (1964)).

A. Appellants Stated a Valid Claim Under *Bandemer*.

Appellants' allegations in this case were sufficient to establish the 2001 Plan's unconstitutionally discriminatory effects. Appellants alleged that the 2001 Plan will generate extremely disproportionate results: although a majority of Michigan voters have favored Democratic candidates in recent federal elections, the 2001 Plan is likely to produce a congressional delegation that consists of ten Republicans and only five Democrats. J.S. App. 3a, 44a-47a. Appellants further alleged that this partisan skew would be locked in for at least a decade, that 9 of the 15 districts would remain safely out of reach even if Democrats increased their statewide victory margins by 10 percentage points, and that this unprecedented degree of bias and noncompetitiveness was achieved by violating the neutral criteria codified in the 1999 Congressional Redistricting Act. *Id.* 30a-34a, 46a. To be sure, establishing the discriminatory effects of a partisan gerrymander requires a showing of "more than a *de minimis* effect" on the plaintiffs, since "[d]istrict-based elections hardly ever produce a perfect fit between votes and representation," and "[i]nviting attack on minor departures from a supposed norm would too much embroil the judiciary in second-guessing" state legislatures. *Bandemer*, 478 U.S. at 133-34 (plurality opinion). But here, the predictable effect of the 2001 Plan's discrimination against Democratic voters could not possibly be considered a "minor departure" from any reasonable norm.

The level of partisan skew in this case contrasts dramatically with the facts present in *Bandemer*, where the evidence had indicated that Democrats in the 1982 elections won 51.9% of the major-party vote and 43% of the seats in the House, and won 53.1% of the vote and 52% of the seats in the Senate. *See* 478 U.S. at 115, 134, 137 n.16 (plurality opinion). Moreover, in *Bandemer*, "the District Court [had] declined to hold that the 1982 election results were the predictable consequences of the 1981 Act" or "that those results were a reliable prediction of future ones." *Id.* at 135.

Here, despite the fact that Democrats, by any measure, constitute at least half of Michigan voters in congressional elections, the predictable result of the 2001 Plan is that Republicans will win twice as many seats as the Democrats in Michigan's congressional delegation, J.S. App. 3a, and will hold that advantage for the remainder of the decade, *id.* 44a-47a. That bias was far from inevitable: the Democratic legislators' alternative plans would have generated rough proportionality between each party's vote share and its seat share, while respecting county and municipal boundaries, as Michigan law requires. *Id.* 31a-32a, 47a-49a. The 2001 Plan therefore violates the Equal Protection Clause by needlessly consigning a political majority to minority status. *See Bandemer*, 478 U.S. at 133, 135 (plurality opinion).

B. The District Court Adopted a Construction of *Bandemer* That Would Effectively Overrule It.

The District Court's test effectively bars members of either major political party from stating a claim of unconstitutional partisan gerrymandering and thus conflicts with this Court's holding in *Bandemer*. The court below held that plaintiffs not only must allege that a redistricting plan intentionally discriminates against an identifiable political group and that it will generate severe and persistent disproportionality between that group's share of votes and its

share of seats. Under the District Court's test, plaintiffs also must allege at least one of three "other indicia" of political powerlessness: (1) that members of their political party will be *completely* excluded from the political process; (2) that the candidates favored by the map, when elected, will *entirely* ignore constituents aligned with the disfavored party, refusing even to listen to their views or to help them with constituent casework; or (3) that the disfavored party has *no chance* of obtaining a more favorable districting plan ten years hence, after the next reapportionment. J.S. App. 6a-14a. Because in reality no member of a major political party could ever establish any of these three indicia of powerlessness, the decision below effectively overrules *Bandemer* and insulates all congressional districting plans from scrutiny under the Equal Protection Clause.

The first of the three indicia – being "completely excluded" or "shut out" from the political process – is based on a misreading of the *Bandemer* plurality opinion. That opinion cited this Court's earlier cases invalidating redistricting plans that intentionally diluted the voting strength of *racial* minorities: "In those cases, the racial minorities asserting the successful equal protection claims had essentially been shut out of the political process." *Bandemer*, 478 U.S. at 139 (plurality opinion). The minority plaintiffs in those cases had proved disproportional under-representation "in conjunction with strong indicia of lack of political power and the denial of fair representation." *Id.* The *Bandemer* plurality never suggested that plaintiffs bringing *partisan*-gerrymandering claims had to meet the *identical* standard, because that would be tantamount to making those claims nonjusticiable. History shows that a racial minority group comprising 10 or 20 percent of a jurisdiction's population can be essentially "shut out" of the political process when its members are deprived their rights to register or vote or raise funds or organize campaigns. But

there are no instances of a major political party (typically with the support of somewhere between 40 and 60 percent of the electorate) being so completely excluded from the political process. This is a test that will never be met.

The same is true of the second of the District Court's indicia of political powerlessness – the requirement that elected representatives "entirely" ignore the interests of citizens who voted against them. Appellants' second amended complaint alleged that Republican Representatives from safely Republican districts not only would ignore the interests of Democratic citizens, but would use their power on the floor of the House and in its committees and subcommittees to actively oppose policies promoted by Democratic officeholders, candidates, and voters. *See* J.S. App. 47a. Absent any serious electoral competition, these Representatives would lack the incentive to appease Democratic-leaning voters. Indeed, political scientists have long recognized that lopsided, noncompetitive districts spawn Representatives who tend to be averse to centrism and compromise. But there is simply no evidence to indicate that partisan Members of Congress refuse even to "listen" to constituents' opposing viewpoints, nor do they typically apply a partisan litmus test before assisting constituents with casework, such as helping senior citizens get their checks from the Social Security or Veterans' Administration. That kind of discrimination would be political suicide. The District Court nevertheless held that, so long as Republican Representatives "listen" to Democratic constituents and help them occasionally to navigate the federal bureaucracy, Democrats' interests will not be "entirely" ignored and therefore they cannot state a cognizable claim of partisan gerrymandering. *Id.* 22a. This, too, is a test that can never be met.

Finally, future plaintiffs will fare no better in alleging the District Court's third indicia of political powerlessness – the impossibility of getting a more favorable map after the next round of redistricting. The District Court stated that the mere possibility that Michigan might elect a Democratic Governor or a Democratic State Senate within the next decade rendered it impossible for a Democratic plaintiff to satisfy this requirement. *Id.* 8a-9a, 21a. But, as already explained, *Bandemer* itself focused on claims alleging that a political *majority* had been consigned to minority status – and, by definition, members of a political *majority* always have at least some realistic potential to elect their preferred candidate for Governor (or for any other statewide office not subject to gerrymandering). Thus, any group that is weak enough to satisfy this third indicia of powerlessness could never allege the "continued frustration of the will of a majority of voters" that *Bandemer* requires. 478 U.S. at 133 (plurality opinion).

Under any of these three indicia, a plaintiff must prove facts that have nothing to do with the challenged map and, in practice, never exist. Indeed, the one case in which a federal court did find a viable *Bandemer* claim – *Republican Party v. Martin*, 980 F.2d 943 (4th Cir. 1992) – would have ended with a dismissal on the pleadings under the test enunciated by the District Court in this case. *Martin* was a challenge to a statewide system for electing trial judges that had resulted in the election of just one Republican in 90 years. *See id.* at 947-49. The court rejected the defendants' demand that Republicans show they had been completely "shut out" of the political process. *See id.* at 958. Requiring members of a major political party to allege that they have been *silenced* would be to "hold, in effect, that regardless of the specific allegations of its complaint an identifiable political group could not survive a motion to dismiss or prevail on the merits of its claim." *Id.* Such a construction, the court noted,

"would render nugatory [*Bandemer*'s] holding that political groups may bring claims of partisan gerrymandering." *Id.*

Furthermore, the three indicia of political powerlessness were not the factors on which this Court relied in evaluating whether the *Bandemer* plaintiffs had stated a valid partisan-gerrymandering claim. The *Bandemer* plurality did not, for example, evaluate whether Democratic voters remained free to speak on issues of public concern, potentially could influence Republican legislators, or were able to elect some Democratic legislators. Instead, this Court rejected plaintiffs' claim because they had failed to establish that the disproportionate result of *one* election had predictably resulted from the redistricting plan or was a reliable predictor of future election results. *See Bandemer*, 478 U.S. at 134-35, 139-40 (plurality opinion). Thus, the Court based its decision on the extent and duration of the plan's likely effects on election outcomes.

In short, to satisfy the "actual discriminatory effects" element of *Bandemer*, a plaintiff need only show (1) that "the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively," and (2) that this bias will cause "continued frustration of the will of a majority of the voters." *Id.* at 133 (plurality opinion). To be sure, this will occur infrequently – only where a State is relatively evenly balanced politically, but one party controls both the legislature and the governorship and is able to use that control to push through a congressional redistricting plan designed to entrench a consistent and substantial advantage over the other party. But under *Bandemer*, a State violates the Equal Protection Clause when, as here, it consigns a political party to one-third or less of the congressional seats, even if that party consistently wins a majority of the popular vote statewide.

The allegations in this case thus suffice to make out a partisan-gerrymandering claim under *Bandemer*. The 2001 Plan will achieve its intended effect and produce extremely disproportionate outcomes, resulting in the "continued frustration of the will of a majority of the voters" for at least the next five election cycles – precisely the type of "actual discriminatory effect" that *Bandemer* identified as sufficient to state a political-gerrymandering claim. 478 U.S. at 127, 133, 135, 140 (plurality opinion).

II. UNDER THIS COURT'S *SHAW V. RENO* LINE OF CASES, THE 2001 PLAN UNCONSTITUTIONALLY SUBORDINATES TRADITIONAL NEUTRAL DISTRICTING PRINCIPLES TO RANK PARTISANSHIP.

The 2001 Plan violates the Equal Protection Clause by emphasizing purely partisan considerations to the exclusion of traditional neutral districting principles such as compactness and respect for county and municipal boundaries. In a series of post-*Bandemer* decisions beginning with *Shaw v. Reno*, 509 U.S. 630 (1993), this Court has clarified the boundary between constitutional uses of otherwise permissible districting considerations – such as race or party affiliation – and unconstitutional discrimination. In evaluating a claim of race-based redistricting, the *Shaw* Court held that a state legislature may not jettison neutral districting principles with the predominant purpose of advantaging or disadvantaging a particular group of voters. *Id.* at 642; *see also Miller v. Johnson*, 515 U.S. at 916-17. The Court determined that the consideration of race – which is unquestionably legitimate in redistricting decisions under Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. §§ 1973, 1973c – becomes illegitimate when race is considered to the exclusion of other traditional neutral districting principles such as "compactness,

contiguity, and respect for political subdivisions." *Shaw*, 509 U.S. at 647. The Court's holding was based in part on its concern for the *expressive* harms that stem from governmental classification of voters on the basis of their race, and in part on its concern for *representational* harms:

> When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.

Id. at 648; *accord Miller*, 515 U.S. at 911-12.

The holdings in *Shaw* and *Miller* apply here as well, for two reasons. *First*, the representational harms the Court identified are, if anything, more acute in cases of partisan gerrymandering. When district lines are drawn solely to strengthen one party's grip on a district, the legislature sends an unmistakable message to the representative of that district that he or she need only respond to the concerns of that party's voters. *Second*, just as classifications based on race are of particular concern under the Equal Protection Clause, classifications based on partisan affiliation or political viewpoint are generally barred by the First and Fourteenth Amendments, as this Court has repeatedly stated in the political-patronage cases. *See, e.g., Williams v. Rhodes*, 393 U.S. 23, 31 (1968); *see also Police Dep't v. Mosley*, 408 U.S. 92, 94-95 (1972). The State's burden of justifying laws that discriminate on the basis of political views is indeed a heavy one. *See, e.g., O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 717 (1996); *Elrod v. Burns*, 427 U.S. 347, 372-73 (1976) (plurality opinion). That burden should apply where a districting map is based entirely on the goal of maximizing the voting power of one party at the

expense of another, while subordinating traditional neutral districting principles.

The Court's opinions in *Hunt v. Cromartie*, 526 U.S. 541 (1999), and *Easley v. Cromartie*, 532 U.S. 234 (2001), which drew a distinction between race and politics as districting concerns, do not bar application of the *Shaw* approach to political-gerrymandering cases. In those cases, the Court held that a district is not drawn predominantly on the basis of race in violation of *Shaw v. Reno* where the evidence is equally consistent with "a constitutional political objective" – there, the creation of a single safe Democratic seat. *Easley*, 532 U.S. at 238. The claim was that the legislature was seeking to separate Democrats from Republicans to create both a Democratic-leaning district and neighboring Republican-leaning districts. Although these decisions affirm that political considerations often are permissible in districting, they do not stand for the proposition that a concerted effort to minimize the voting strength of a disfavored political party *statewide*, accompanied by a complete subordination of neutral districting criteria, is less of a constitutional concern than a comparable effort to separate voters based on race.

The 2001 Plan is clearly unconstitutional under the principles announced in *Shaw*. Here, Republican legislators, in a single-minded effort to maximize their partisan advantage, jettisoned the neutral districting principles that they had codified only two years earlier. *See* J.S. App. 30a-34a, 49a. On an almost perfect party-line vote, the Michigan House of Representatives rejected an alternative map whose district lines broke *half* as many county boundaries as did the 2001 Plan. *Id.* 31a-32a. Because Michigan's 1999 Congressional Redistricting Act requires *minimizing* the number of county and municipal boundaries broken by congressional district lines, the alternative plan clearly

demonstrated the illegality of the 2001 Plan. Even after the Republican legislators reinterpreted their governing criteria to overcome this problem, a second alternative plan then demonstrated that the 2001 Plan did not fully satisfy those criteria. *Id.* 41a-42a. The 2001 Plan thus can rationally be viewed only as an effort to classify voters on the basis of their political-party affiliation, without regard to the neutral districting principles the Michigan Legislature itself adopted. *See Shaw*, 509 U.S. at 644; *Miller*, 515 U.S. at 913.

This Court, having interpreted the Fourteenth Amendment as requiring strict scrutiny of districts drawn predominantly on the basis of voters' race, should take the next step and recognize that districts drawn predominantly on the basis of voters' political viewpoint are also constitutionally suspect. Appellants have alleged that the Michigan Legislature abandoned the neutral districting principles that it had codified in 1999 and reenacted in 2001 – including minimization of county-boundary and municipal-boundary breaks – to ensure that Republicans will win two-thirds of Michigan's districts even if Democrats receive a majority of votes statewide. Those allegations should clearly suffice to state a cognizable equal-protection claim.

III. ENACTMENT OF THE 2001 PLAN EXCEEDED THE STATE LEGISLATURE'S LIMITED AUTHORITY TO REGULATE FEDERAL ELECTIONS UNDER ARTICLE I.

The 2001 Plan also violates Article I of the Constitution because the Elections Clause does not give state legislatures the power to rig congressional elections and thereby thwart effective majority rule. But the District Court did not even consider Appellants' Elections Clause claim. The court instead held that the Michigan Legislature's power to draw congressional districts flows solely from Section 2 of Article

I – not from Section 4's Elections Clause – and thus Section 4 "has no role to play." J.S. App. 15a.

The District Court's understanding of Section 4's Elections Clause is blatantly incorrect. As a different three-judge federal district court noted earlier this year, "[n]o case – or any other authority – has ever expressed doubt that this constitutional provision applies to congressional redistricting." *Smith v. Clark*, 189 F. Supp. 2d 548, 550 (S.D. Miss.) (three-judge court), *prob. juris. noted sub nom. Branch v. Smith*, 122 S. Ct. 2355 (2002). Indeed, this Court has repeatedly recognized that the power to prescribe the "Places and Manner of holding Elections for . . . Representatives" encompasses the power of congressional redistricting. *See, e.g.*, *McPherson v. Blacker*, 146 U.S. 1, 26 (1892); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 567, 569-70 (1916); *Smiley v. Holm*, 285 U.S. 355, 363-73 (1932); *Holder v. Hall*, 512 U.S. 874, 898 (1994) (Thomas, J., concurring in the judgment); *Bush v. Vera*, 517 U.S. 952, 1047 (1996) (Souter, J., dissenting).

Moreover, the Elections Clause of Article I, Section 4 fundamentally limits a state legislature's power to gerrymander congressional districts. To date, this Court has not addressed the contours of those limits in a political-gerrymandering case; indeed, many of the post-*Bandemer* political-gerrymandering cases, like *Bandemer* itself, have involved state-legislative redistricting, to which Article I does not apply. But in the context of a State's regulation of federal elections, recent decisions by this Court have made clear that Article I forbids States from using their Elections Clause authority to thwart the will of a majority of the

voters, as the Michigan Legislature has done in enacting the 2001 Plan.[4]

In Article I of the Constitution, the Framers vested the legislative power of the United States in two chambers: the Senate, which was intended to represent the States, and the House of Representatives, which was intended to represent the People, and whose members were accordingly to be chosen "by the People of the several States." U.S. CONST. art. I, § 2. Under the Article I framework, the right to choose congressional representatives "belongs not to the States, but to the people," since "the Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen directly, not by States, but by the people." *U.S. Term Limits*, 514 U.S. at 821. This Court has held that the fundamental principle that the House of Representatives is to be chosen "by the People" forbids States from valuing one person's vote in a congressional election more than another's, *see Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964); from forbidding congressional candidates who have served more than two terms to appear on the ballot, *see U.S. Term Limits*, 514 U.S. at 832-35; and from noting on the ballot a congressional candidate's failure to support term limits, *see Cook v. Gralike*, 531 U.S. at 525-26. This principle also forbids States from distorting

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[4] In a recent speech to the Federalist Society, Professor McConnell argued that *state-legislative* districting plans that "systematically prevent[] effective majority rule" should be invalidated under the Republican Form of Government Clause, U.S. CONST. art. IV, § 4, rather than the Equal Protection Clause. Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 114 (2000); *see also id.* at 116 ("Partisan gerrymandering . . . [that gives] a political minority effective control . . . is in obvious tension with the values of Republicanism."). As explained below, Article I provides a particularly strong basis for challenging a *congressional* plan that systematically frustrates effective majority rule.

congressional district lines to favor the party that momentarily controls the legislature, at the expense of the majority of the electorate.

Consistent with their vision of the House of Representatives as accountable to the people rather than to the States, the Framers limited the States' involvement in congressional elections to a tightly circumscribed power to set "[t]he Times, Places and Manner" of holding federal elections under the Elections Clause, U.S. CONST. art. I, § 4, cl. 1. This limited delegation of authority to regulate the procedures for conducting congressional elections reflects the Framers' "overriding concern" regarding "the potential for States' abuse of the power." *U.S. Term Limits*, 514 U.S. at 808-09. The Framers were particularly worried that factional control of state legislatures might frustrate the will of the people in congressional elections. Discussing the Elections Clause at the Constitutional Convention, Madison noted:

> It was impossible to foresee all the abuses that might be made of the discretionary power. . . . Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed. Besides, the inequality of the Representation in the Legislatures of particular States, would produce a like inequality in the Natl. Legislature, as it was presumable that the Counties having the power in the former case would secure it to themselves in the latter.

2 *Records of the Federal Convention* 239. Madison's fear that a state legislature might abuse its authority to override majority rule was echoed throughout the ratifying conventions.

In Massachusetts, one delegate worried that state legislatures,

> when faction and party spirit run high, would introduce such regulations as would render the rights of the people insecure and of little value. They might make an unequal and partial division of the states into districts for the election of representatives, or they might even disqualify one third of the electors.

2 *Elliot's Debates* 22-35 (Parsons). Another delegate noted that "a part [of Congress] should proceed directly from the people, and not from their substitutes, the legislatures; therefore the legislature ought not to control the elections," since "the [state] legislature may have a power to counteract the will of a majority of the people." 2 *id.* (Dana). In North Carolina, a delegate explained that limiting the state legislatures' authority over congressional elections would help "to secure a representation from every part, and prevent any improper regulations, calculated to answer party purposes only." 1 *Annals of Congress* 768-73 (Ames).

The Elections Clause was thus drafted not as a grant of plenary power, but rather as a limited delegation of authority to the States, confined to procedural matters such as "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns." *Smiley v. Holm*, 285 U.S. at 366. As the Court said in *U.S. Term Limits*, "the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." 514 U.S. at 833-34; *accord Gralike*, 531 U.S. at 523.

This Court has made clear that judicial review of state regulation of election procedure to determine whether it satisfies these principles is more searching in the context of congressional redistricting than is similar review of state-

legislative redistricting under the Equal Protection Clause. For example, while the Equal Protection Clause requires adherence to the "one person, one vote" principle in the context of state-legislative redistricting, it affords more flexibility to States to deviate from absolute population equality in pursuit of legitimate state policies than does Article I, Section 2, which applies to congressional redistricting. Accordingly, while this Court has held that the Equal Protection Clause will tolerate population deviations at least as large as ten percent in the context of state-legislative redistricting, *see Brown v. Thomson*, 462 U.S. 835, 842-43 (1983), Article I will not tolerate even *de minimis* population deviations below one percent without adequate justification, *see Karcher*, 462 U.S. at 731-32.

Similarly, while the Constitution may tolerate somewhat larger departures from absolute neutrality in state-legislative redistricting, Article I strictly constrains the political faction that happens to control the state legislature at the right moment in the decennial congressional redistricting cycle from dictating the composition of the State's congressional delegation, at the expense of the right of "the people [to] choose whom they please to govern them." *U.S. Term Limits*, 514 U.S. at 793 (citation and internal quotation marks omitted). As Judge Niemeyer explained in a dissent that foreshadowed this Court's decisions in *U.S. Term Limits* and *Gralike*, "[t]here are fundamental differences between congressional districting under Art. I . . . [and] state legislative reapportionments." *Anne Arundel County Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394, 402 (D. Md. 1991) (three-judge court) (Niemeyer, J., dissenting) (citation and internal quotation marks omitted), *summarily aff'd*, 504 U.S. 938 (1992). Under Article I, "the State may not attempt to dictate the outcome of congressional elections" by

drawing congressional districts that confer a substantial advantage on one political party. *Id.* at 402-03.

The 2001 Plan exceeds these limits on a State's authority to regulate congressional elections. *First*, it is designed to "dictate electoral outcomes": under the plan, the outcomes of elections in 14 of Michigan's 15 congressional districts are preordained, giving Michigan voters little more than the power to ratify results already engineered by the state legislature's mapmakers. *See U.S. Term Limits*, 514 U.S. at 833-34; *Gralike*, 531 U.S. at 523. *Second*, the 2001 Plan frustrates the majority's will by drawing districts that dispense with the State's duly enacted neutral districting criteria to maximize Republican advantage in congressional elections.

The 2001 Plan is thus much more than a mere procedural regulation. It discriminates against Democratic candidates and voters and virtually guarantees a minority party's dominance for a decade. As such, it is an unconstitutional abuse of the Michigan Legislature's power under Article I of the Constitution.

CONCLUSION

The Court should note probable jurisdiction.

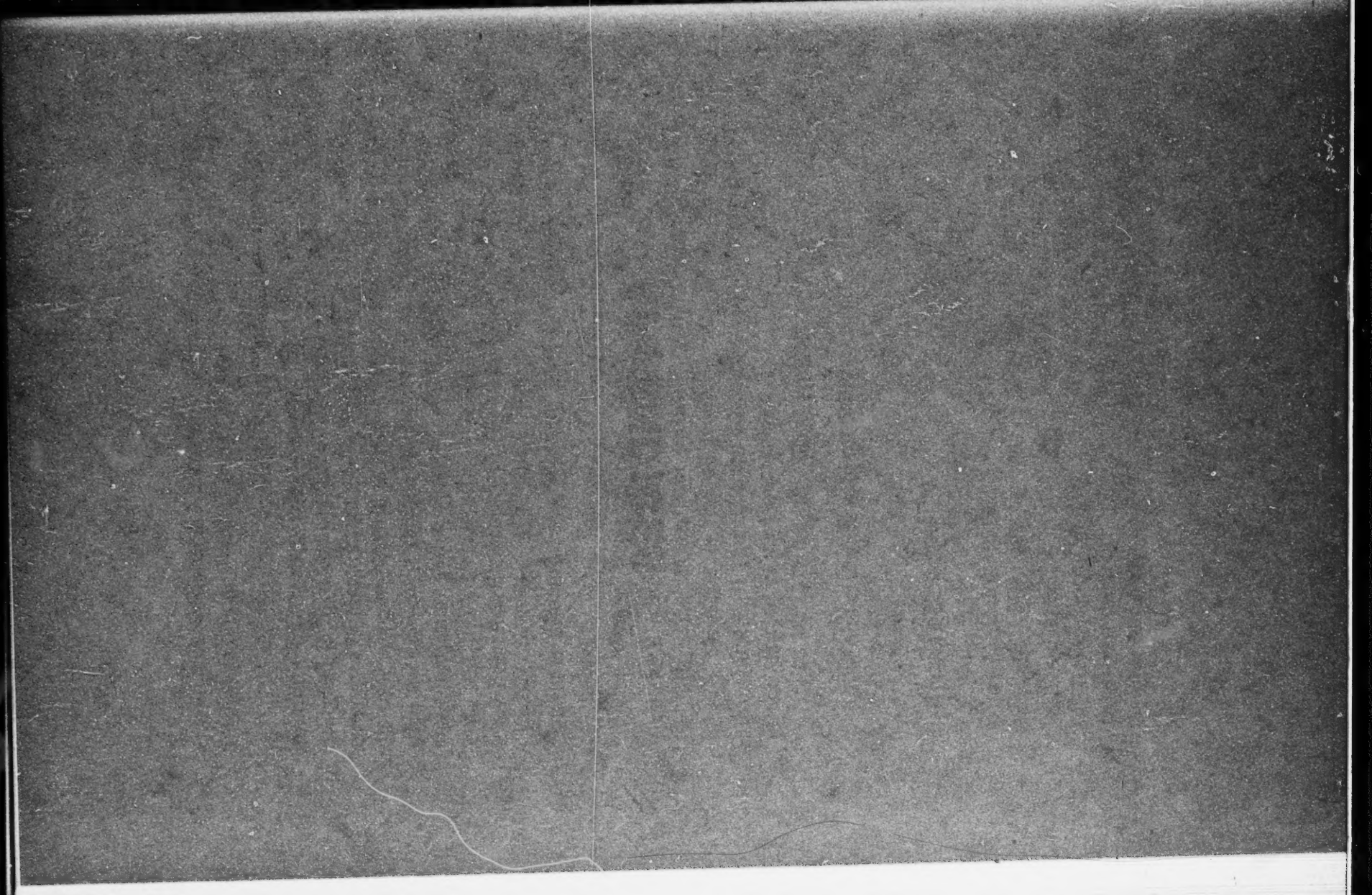
Respectfully submitted,

F. THOMAS LEWAND
R. CRAIG HUPP
WILLIAM B. FORREST III
BODMAN, LONGLEY
& DAHLING LLP
100 Renaissance Center
Thirty-fourth Floor
Detroit, Michigan 48243
(313) 259-7777

PAUL M. SMITH
Counsel of Record
SAM HIRSCH
MARC A. GOLDMAN
JAMES A. TRILLING
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Counsel for Appellants

APPENDICES



APPENDIX A

United States District Court,
E.D. Michigan,
Southern Division.

Pat O'Lear, Kay Ann Chase, Steve Borrello, Lawrence Kestenbaum, Charlie Harrison, III, James Larkin, Christopher Smith, Donald Rittering, Barbara Long, George Gaines, and Minnie H. Whiting,

Plaintiffs,

v.

Candice S. Miller and Christopher Thomas,

Defendants,

and

Michigan Republican Party, Patrick Miller, Andrew Pettress, and James L. Palaske,

Defendant-Intervenors.

Case Number 01-72584-BC.

May 24, 2002.

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART THE MOTIONS TO DISMISS, DISMISSING CLAIM III WITHOUT PREJUDICE, AND DISMISSING ALL OTHER CLAIMS WITH PREJUDICE

Plaintiffs, a group of registered Michigan Democrats, bring this action challenging Michigan's 2001 congressional redistricting plan. They name Candice S. Miller, in her official capacity as Michigan's Secretary of State, and Christopher M. Thomas, in his official capacity as Michigan's Director of Elections, as defendants. The Michigan Republican Party, Patrick Miller, Andrew Pettress, and James L. Palaske have intervened as defendants.

Pursuant to Rule 12(b)(6) and 12(c) of the Federal Rules of Civil Procedure, defendants request that this court dismiss plaintiffs' lawsuit for failure to state a claim upon which relief can be granted. We grant defendants' motions in part, dismiss plaintiffs' equal protection claim without prejudice, dismiss plaintiffs' remaining claims with prejudice, and grant plaintiffs leave to amend their complaint within thirty days of the date of this Order.[1]

I.

Assuming the truth of plaintiffs' factual allegations and construing the inferences from those allegations in the light most favorable to plaintiffs, the relevant facts are as follows.

On July 11, 2001, the Michigan legislature, by a virtual straight party-line vote, passed the congressional redistricting plan that is the subject of this lawsuit. On September 11, 2001,

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[1] Because 42 U.S.C. § 1983 is not a source of substantive rights, we do not address plaintiffs' section 1983 claim. *See Albright v. Oliver*, 510 U.S. 266, 271 (1994); *Upsher v. Grosse Pointe Pub. Sch. Sys.*, 285 F.3d 448, 452 (6th Cir. 2002).

Michigan's governor signed the bill containing the challenged plan into law.

The districts in existence prior to the challenged plan's enactment were drawn in 1992 by a three-judge district court. *See Good v. Austin,* 800 F. Supp. 551 (E.D. Mich. 1992). In the most recent elections conducted using the court-drawn districts, Democratic candidates received 54.8% of the majority-party vote. This percentage closely corresponds to the number of congressional seats Democrats currently control in Michigan, 9 out of 16 – roughly 56.3% of the available seats.

Moreover, the margin by which Democrats carried the statewide vote increased from seven percentage points in 1996 (53.5% to 46.5%) to slightly more than nine percentage points in 2000. Given this increased margin, and given our obligation to construe the facts in the light most favorable to plaintiffs, we conclude for the purposes of our decision today that the Michigan electorate has been trending Democratic in recent years.

Despite the increasing majority of Democratic voters in Michigan, Republicans are likely to win ten of Michigan's fifteen congressional seats under the challenged plan. On the basis of this disproportionate representation and its potential to continue for a prolonged period of time, plaintiffs claim that the challenged plan violates several provisions of the United States Constitution: Article I, sections 2 and 4 (as amended by section 2 of the Fourteenth Amendment), the Equal Protection Clause and the Privileges and Immunities Clause of the Fourteenth Amendment, and the First Amendment.

Plaintiffs also claim that the challenged plan limits the voting strength of Michigan's – staunchly Democratic – African-American voters by dispersing African-American populations

throughout Republican districts. Plaintiffs concede, however, that no African-Americans residing outside of Wayne County could conceivably reside in a majority-minority district and do not claim that the "dilution" of African American voting strength stems from racial – as opposed to political – animus. Nevertheless, plaintiffs claim that the challenged plan violates the Fifteenth Amendment and section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

In addition to the purported deficiencies laid out above, plaintiffs claim the challenged plan's legitimacy is impaired by a host of procedural defects accompanying its enactment. The Michigan Supreme Court, however, resolved plaintiffs' procedural claims against them in *LeRoux v. Secretary of State,* 465 Mich. 594, 640 N.W.2d 849 (2002), and we do not address them here.

II.

The standard for dismissal under Rule 12(b)(6) is identical to that for judgment on the pleadings under Rule 12(c). *Mixon v. State of Ohio,* 193 F.3d 389, 400 (6th Cir. 1999). Under that standard, we may not dismiss plaintiffs' complaint unless we are convinced that plaintiffs can prove no set of facts that would state a claim upon which relief could be granted. *Nelson v. Miller,* 170 F.3d 641, 649 (6th Cir. 1999).

A.

Our analysis of plaintiffs' equal protection claim begins with the Supreme Court's decision in *Davis v. Bandemer,* 478 U.S. 109 (1986). There, Democratic plaintiffs challenged Indiana's 1981 reapportionment plan, claiming it represented an unconstitutional partisan gerrymander. In the first elections held

under the 1981 plan, Democrats received 51.9% of the votes cast for seats in the Indiana House of Representatives statewide, but secured only 43 out of 100 seats. In the Indiana Senate, Democrats received 53.1% of the votes cast statewide, and 13 out of 25 Democratic candidates were elected. Relying on these election results, a three-judge district court found the reapportionment plan violated the Equal Protection Clause. The district court concluded that the 1981 plan was unconstitutional because it "purposely inhibit[ed] . . . proportional representation," and was therefore unacceptable. *Id.* at 116 (discussing the district court's opinion) (citation omitted).

The defendants appealed to the Supreme Court, arguing that the case was nonjusticiable and that the plaintiffs had failed to state a cognizable equal protection claim. *Id.* at 118.

The Supreme Court found that partisan gerrymandering claims are justiciable under the Equal Protection Clause, but it rejected the district court's conclusion that the plaintiffs stated a cognizable equal protection claim. A plurality of the Court stated that to prevail on a valid partisan gerrymandering claim the plaintiff must prove "[1] intentional discrimination [2] against an identifiable political group and [3] an actual discriminatory effect on that group."[2] *Id.* at 127. Having identified these elements, the

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[2] A fragmented Court decided *Bandemer*. Because the opinion of *Bandemer*'s four justice plurality provides the narrowest ground in support of its judgment, this court is bound by the plurality's reasoning. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.") (internal citation and (continued...)

plurality allowed as how the requirements "may be difficult of application." *Id.* at 142. The Court's observation pointed primarily to the third element – proof of actual discriminatory effect – inasmuch as intent to discriminate against an identifiable group can readily be established in a partisan division of electoral districts. It is proof of the third element that the *Bandemer* Court found wanting in that case.

Here, like in *Bandemer,* the first two elements are easily satisfied. Defendants do not contest the intentional discrimination element. *Cf. id.* at 129 ("As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended."). Moreover, as registered Democrats, plaintiffs are an identifiable group. *See, e.g., Vieth v. Commonwealth of Penn.,* 188 F. Supp. 2d 532, 544 (M.D. Pa. 2002) ("Clearly, by alleging that they are Pennsylvanian citizens who vote for Democrats, Plaintiffs have satisfied this requirement.").

It was in defining the third element – "an actual discriminatory effect" – that the Supreme Court reflected its reluctance to interfere with an essentially political – although justiciable – controversy which infuses all partisan gerrymandering cases. The Court acknowledged "the delicacy of intruding on this most political of legislative functions," *id.* at 143, by setting a high threshold for demonstrating "an actual discriminatory effect." Consequently, a redistricting plan may be drawn "with the specific intention of disadvantaging one political party's election prospects," *id.* at 139, and may cause election results that are

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[2](...continued)
punctuation omitted). *See also Republican Party of North Carolina v. Martin,* 980 F.2d 943, 955 n.22 (4th Cir. 1992) (finding *Bandemer* plurality opinion binding under *Marks*).

unfair because they are disproportional to the percentage of the population voting for that party on a state-wide basis, and yet not violate the Constitution. *Id.* at 132, 139. To prove unconstitutional discrimination, the under-represented political group must also show that "the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Id.* at 132.

It is the task of the courts, then, to distinguish between those partisan redistricting plans which are merely unfair, as this one is alleged to be, and those which are unconstitutional. Drawing our guidance from *Bandemer,* we find that the allegations in the amended complaint do not adequately state that Michigan's redistricting plan will cause an actual discriminatory effect which results in a violation of the Equal Protection Clause.

Bandemer's standard for demonstrating an "actual discriminatory effect" is somewhat murky. The plurality's most definitive articulation of the requirements is as follows: "[U]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will *consistently degrade* a voter's or a group of voters' *influence on the political process as a whole.*" *Id.* at 110 (emphasis added). For majority party plaintiffs, such as those before this court, this means "a finding of unconstitutionality must be supported by evidence of *continued frustration of the will of a majority of the voters.*" *Id.* at 133 (emphasis added).

In terms of the details underlying such proof, the *Bandemer* plurality never offered a checklist of features which together would comprise a systemic frustration of majority will. Rather, the Court found the lower court's conclusion unsupported because there was no finding that the election results in that case were preordained by Indiana's reapportionment act, especially in a

"swing state" where block voting is not the unalterable norm and future election results could differ. Thus, there was no proof that the complaining group would retain minority status throughout the decade or that it had "no hope" of improving its fate in the next reapportionment. *See id.* at 135-36.

In other words, disproportionate election results will not establish a constitutionally infirm districting plan without a showing of some substantial permanency to the arrangement that cannot be overcome through the political process. In ordering this requirement, the Court's focus was not on the political party but on the voters (or group of voters) who are denied the opportunity to participate – are essentially "shut out of the political process" – and who cannot achieve fair representation without the intervention of the courts. *Id.* at 136-37. Thus, the *Bandemer* plurality observed that "[r]elying on a single election to prove unconstitutional discrimination is unsatisfactory." *Id.* at 135. This is especially true in a competitive state – like Michigan – where a moderate shift in voting trends could result in majority status for the minority party.

The plaintiffs in this case have not alleged that they have been shut out of the process or that the challenged congressional redistricting plan is one from which they cannot recover or substantially improve upon. For instance, in *Bandemer*, gubernatorial approval was necessary to sign an Indiana reapportionment bill into law. Because gubernatorial elections are determined by statewide races, which are presumably immune to gerrymandering of any sort, the *Bandemer* plaintiffs' chances of

"doing better" in the next reapportionment could similarly turn on circumstances beyond the actual effects of a partisan gerrymander, but wholly congruent with voter will.[3] Thus, the requirement of "permanency" is not significantly less applicable to plaintiffs' claim than it was to the claims of the *Bandemer* plaintiffs. *Cf. Terrazas v. Slagle,* 821 F. Supp. 1162, 1174 (W.D. Tex. 1993) (finding a wronged partisan group could demonstrate discriminatory effects under *Bandemer* "if it presents evidence of a group perpetuating its power through gerrymandering in one political structure and that the wronged partisan group cannot over the long haul counteract this tactic through its influence in another relevant political structure or structures").

Therefore, absent proof of discriminatory effect through some other avenue, plaintiffs' allegations cannot support a cognizable equal protection claim.

In rejecting both the district court's view and Justice Powell's concurring view as to what constitutes a cognizable equal protection claim, the *Bandemer* plurality suggested two alternative avenues through which plaintiffs could state a cognizable claim: (1) alleging that the challenged plan resulted in their complete

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[3] As opposed to identifying an actual *effect* of a partisan gerrymander, the "no chance of doing better" requirement seems to reflect the plurality's notions of judicial restraint. *Cf. Bandemer,* 478 U.S. at 134 ("[I]t is also appropriate to require allegations and proof that the challenged legislative plan has had or will have effects that are *sufficiently serious to require intervention by the federal courts* in state reapportionment decisions."). That is, the "no chance of doing better" requirement possibly reflects an effort to keep federal courts out of political disputes that are amenable to political solutions. Although it is awkward to apply the "no chance of doing better" requirement to the issue of whether plaintiffs have pled discriminatory effect, we cannot ignore *Bandemer*'s instruction that we do so.

exclusion from the political process or (2) alleging that elected officials would be wholly indifferent to plaintiffs' interests.[4]

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[4] Both alternate showings stem from the Court's earlier decisions involving racial gerrymandering claims in individual multimember districts. The *Bandemer* plurality recognized the distinction between claims brought by minority and majority plaintiff groups. *See Bandemer*, 478 U.S. at 133, 137 (noting that "a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process" and that the "participatory approach to the legality of individual multimember districts is not helpful where the claim is that such districts discriminate against Democrats").

Nevertheless, the *Bandemer* plurality did not suggest that the district context renders those showings inapplicable to majority party claims. Indeed, some courts have read the plurality's suggestion that these alternate proofs were *sufficient* to support an equal protection claim to indicate that such proofs were also *necessary* to an equal protection claim. *See, e.g., Badham v. March Fong Eu*, 694 F. Supp. 664, 668 (N.D. Cal. 1988), *summarily aff'd*, 488 U.S. 1024 (1989) (refusing to sustain Republican claims of unlawful political gerrymandering where plaintiffs did not allege that they had been "'shut out' of the political process" or "that anyone has ever interfered with Republican registration, organizing, voting, fund-raising, or campaigning").

We agree that a showing of this magnitude might be necessary when the plaintiffs seek to attack the design of a particular district with respect to contiguity, compactness, or other design factors that could, if sufficiently egregious, in fact interfere with core party functions or constituents' ability to influence their congressperson. *See, e.g., Pope v. Blue*, 809 F. Supp. 392, 397 (W.D.N.C.), *summarily aff'd*, 506 U.S. 801 (1992) (noting the disruptive effect a district could have that passes through three different media markets). Where the plaintiffs challenge a reapportionment plan as a whole, however, we do not read *Bandemer* to require this type of showing, although, as described above, we

(continued...)

Because plaintiffs do not claim that victorious Republican candidates would be indifferent to the interests of their Democratic constituents or that they have been completely shut out of the political process, they fail to state an equal protection claim upon which relief can be granted.

1.

The *Bandemer* district court found discriminatory effects sufficient to sustain an equal protection claim after the plaintiffs demonstrated that the proportion of Democratic candidates elected in the first election using the 1981 plan's districts did not correspond to the percentage of votes garnered by Democrats. The *Bandemer* plurality, however, rejected the notion that disproportionate representation alone could satisfy the discriminatory effects requirement. In rejecting the district court's conclusion, the plurality noted that in cases involving individual multimember districts, in which the Court had found an equal protection violation, the Court had available evidence suggesting that the excluded groups had "less opportunity to participate in the political process and to elect candidates of their choice." *Id.* at 131. Because the *Bandemer* plurality was unwilling to presume, "without actual proof to the contrary," that elected candidates would "entirely ignore the interests of [the excluded groups]," it found that disproportionate representation alone would not diminish a group's electoral power sufficiently to satisfy the discriminatory effects requirement.

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[4](...continued)
believe it certainly could provide alternate grounds for relief.

Thus, *Bandemer* suggests that disproportionate representation combined with actual proof that elected officials would ignore the interests of the excluded group would satisfy its discriminatory effects requirement. Accordingly, plaintiffs' allegations of disproportionate election results, unaccompanied as they are by evidence of Republican indifference to Democratic citizen interests, cannot sustain plaintiffs' claim.

2.

In his concurring *Bandemer* opinion, Justice Powell suggested that a partisan gerrymandering plaintiff could establish an equal protection violation by demonstrating that the district boundaries were drawn solely to achieve partisan goals. *See Bandemer,* 478 U.S. at 161. In its rejection of Justice Powell's approach, the plurality again referenced its previous individual multimember district decisions: "In those cases, the racial minorities asserting the successful equal protection claim had essentially been shut out of the political process." *Id.* at 139; *see also id.* at 136 (noting that in rejecting the plaintiffs' racial gerrymandering claim in *Whitcomb v. Chavis,* 403 U.S. 124 (1971), the Court had observed "that there was no proof that blacks were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when candidates were chosen, or to be included among the candidates slated by the Democratic Party"). Thus, the *Bandemer* plurality suggested that partisan gerrymandering plaintiffs could state a cognizable equal protection claim by demonstrating that their group had been essentially "shut out of the political process."

Here, plaintiffs do not allege that they have been "essentially shut out of Michigan's political process."

Plaintiffs do not allege (1) that they have no chance of obtaining more favorable congressional districts in the next reapportionment; (2) that Republican candidates would be indifferent to the interests of Democratic citizens; or (3) that the challenged plan would result in Democrats being essentially "shut out" of the political process; therefore, plaintiffs do not state a cognizable equal protection claim. Nor does the amended complaint contain allegations from which these consequences could be inferred.[5]

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[5] The plaintiffs also claim that the Supreme Court in *Shaw v. Reno,* 609 U.S. 630 (1993), and *Miller v. Johnson,* 515 U.S. 900 (1995), suggested that the mere failure to use politically neutral redistricting principles itself violates the Equal Protection Clause. We find no support in either case for this proposition. The Supreme Court has in fact consistently acknowledged that political considerations inevitably play a major role in redistricting decisions:

> It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. Our cases indicate quite the contrary. The very essence of districting is to produce a different – a more 'politically fair' – result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats. Politics and political considerations are inseparable from districting and apportionment. The political profile of a State, its party registration, and voting records are available precinct by precinct, ward by ward. These subdivisions may not be identical with census tracts, but, when overlaid on a census map, it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another. It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena. They can well determine what

(continued...)

In *Bandemer,* the plurality expressed its confidence in our "abilities to distinguish between disproportionality *per se* and the lack of fair representation that continued disproportionality in conjunction with other indicia may demonstrate." *Bandemer,* 478 U.S. at 143 n.21. We find that the plaintiffs have alleged disproportionality in abundance, and that the amended complaint contains ample charges of discriminatory motive and procedural irregularities. The deficiency here is the lack of any claim of the "other indicia" which is required to show the discriminatory effect which *Bandemer* requires. Bandemer draws no bright lines, and neither do we attempt to set forth the *sine qua non* of an unconstitutional reapportionment scheme, except to say that the plaintiffs must set forth allegations which, if proven, justify court intervention into an essentially legislative process.

Mindful of *Bandemer*'s murky nature and the relatively lenient standard for surviving a motion to dismiss, we will dismiss plaintiffs' equal protection claim without prejudice. Plaintiffs may file a complaint, amended to state a claim under our *Bandemer* analysis, within thirty days of the issuance of this Order.

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[5](...continued)

> district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. The reality is that districting inevitably has and is intended to have substantial political consequences.

Gaffney v. Cummings, 412 U.S. 735, 752-53 (1973) (internal citations omitted).

B.

Article I, section four provides, "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art I, § 4. Plaintiffs claim that the challenged plan represents an unconstitutional abuse of legislative power under section 4.

A state's power to subdivide itself into districts, however, does not stem from section 4. Rather, it stems from Article I, section 2, which provides "Representatives . . . Shall be Apportioned Among the Several States." *See also* U.S. Const. amend. XIV, § 2; *Growe v. Emison,* 507 U.S. 25, 34 (1993) (citing Article I, section 2 for the proposition that "the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts").

Because section 2 governs intrastate redistricting, section 4's only applicability results from the Supreme Court's admonition that states may not use section 4 to "immunize" action that would otherwise be unconstitutional. *See Wesberry v. Sanders,* 376 U.S. 1, 6 (1964). The political gerrymander before this court is not otherwise unconstitutional; therefore, there is nothing to immunize and section 4 has no role to play.

Accordingly, we dismiss Claim I with prejudice.[6]

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[6] Because section 2 does not protect against partisan gerrymandering, *see Anne Arundel County Republican Central Committee v. State Administrative Board of Election Laws,* 781 F. Supp. 394, 398 (D. Md. 1991) *summarily aff'd* 504 U.S. 938 (1992), we (continued...)

C.–

Plaintiffs claim that the challenged plan violates their "freedoms of speech and association in violation of the First Amendment of the United States Constitution." Partisan gerrymandering by itself, however, does not support either a freedom of speech or a freedom of association claim. *See, e.g., Washington v. Finlay,* 664 F.2d 913, 928 (4th Cir. 1981) ("[W]here there is no device that directly inhibits participation in the political process, the First Amendment . . . offers no protection of voting rights beyond that afforded by the [F]ourteenth and [F]ifteenth Amendments."); *Badham,* 694 F. Supp. at 675 ("While plaintiffs may be discouraged by their lack of electoral success, they cannot claim that [the reapportionment plan] regulates their speech or subjects them to any criminal or civil penalties for engaging in protected activities."). Thus, plaintiffs fail to state a claim under the First Amendment upon which relief can be granted.

Accordingly, we dismiss Claim II with prejudice.

D.

The Privileges and Immunities Clause of the Fourteenth Amendment provides, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV, § 1. For some time, the Privileges and Immunities Clause has been treated as "essentially dormant." *See, e.g., Pope,* 809 F. Supp. at 399 (quoting Laurence H. Tribe, *American Constitutional Law* 548 (2d ed. 1988)). In

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[6](...continued)
dismiss Claim I in its entirety.

Saenz v. Roe, 526 U.S. 489, 502 (1999), however, the Supreme Court determined that the clause protects "the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State." Plaintiffs argue that *Saenz* "breathe[d] new life into the clause." (citing *Saenz,* 526 U.S. at 511 (Rehnquist, C.J., dissenting)). They claim that the challenged plan violates the revitalized Privileges and Immunities Clause by denying Democratic voters the right – enjoyed by Republican voters – to fair representation and an effective vote.

We can find no overt support for the proposition that the Privileges and Immunities Clause protects the right to fair representation or the right to an effective vote. *Cf. Pope,* 809 F. Supp. at 399. Moreover, without more explicit guidance, we are reluctant to infer such protection from the Supreme Court's treatment of newly arrived state citizens. Accordingly, we dismiss Claim IV with prejudice.

E.

In *Thornburg v. Gingles,* 478 U.S. 30 (1986), the Supreme Court articulated three preconditions to a cognizable vote-dilution claim under section 2 of the Voting Rights Act:

1. "[T]he minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district."
2. "[T]he minority group must be able to show that it is politically cohesive."
3. "[T]he minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."

Id.; see also Voinovich v. Quilter, 507 U.S. 146, 156-57 (1993) (holding that "the *Gingles* preconditions apply in challenges to single-member as well as multimember districts"); *Cousin v. Sundquist,* 145 F.3d 818, 823 (6th Cir. 1998) ("[A] section 2 claim cannot proceed unless all three *Gingles* preconditions are satisfied.").

Plaintiffs admit that "[o]utside of Wayne County, *blacks in Michigan would not reside in a majority-black district under any redistricting plan.*" Moreover, plaintiffs acknowledge that, under the challenged plan, "the entire African American population of Detroit [in Wayne County] has been placed in two districts (the Thirteenth and Fourteenth) *that offer ample opportunity to elect black-preferred candidates.*" (emphasis added). Thus, minority voters cannot demonstrate that their numbers are sufficiently large and geographically compact to constitute a majority in a single-member district, other than in the two districts where they have "ample opportunity to elect black-preferred candidates."

In an effort to salvage their moribund section 2 claim, plaintiffs argue that the challenged plan's failure to construct districts that would permit minorities to "have a significant impact on congressional elections" constitutes a section 2 violation.

The Supreme Court has not expressly decided whether section 2 permits influence claims. *See Voinovich,* 507 U.S. at 154-57 (assuming, without deciding, that an influence claim was actionable). In *Cousin,* however, the Sixth Circuit rejected the idea that an impairment of minority voters' ability to influence, rather than determine, the outcome of an election supported a cognizable section 2 claim. *Cousin,* 145 F.3d at 828-29 ("[W]e do not feel that an 'influence' claim is permitted under the Voting Rights Act.").

Because plaintiffs cannot satisfy the *Gingles* preconditions and because we do not recognize "influence" claims, plaintiffs cannot state a claim under the Voting Rights Act. Accordingly, we dismiss Claim VII with prejudice.

F.

The Fifteenth Amendment states, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude." U.S. Const. amend. XV, § 1. As discussed above, plaintiffs cannot state a cognizable vote dilution claim; therefore, we need not address whether the Fifteenth Amendment covers plaintiffs' vote dilution claim. Because plaintiffs do not allege racial animus, they cannot state a cognizable claim under the Fifteenth Amendment. *City of Mobile, Alabama v. Bolden,* 446 U.S. 55, 61-66 (1980) (plurality decision). Accordingly, we dismiss Claim V with prejudice.

III.

It is ORDERED that plaintiffs' equal protection claim is dismissed without prejudice and plaintiffs' remaining claims are dismissed with prejudice. Plaintiffs may amend their complaint within thirty days of the date of this Order. If plaintiffs do not amend their Complaint within 30 days, the matter shall be closed, and further challenges to the redistricting plan based on new evidence after subsequent elections, if any, shall require a new filing. Our determination today does not change the application of our April 24, 2002, Order imposing a June 11, 2002, deadline for receiving nominating petitions, which remains in full force and effect.

APPENDIX B

United States District Court,
E.D. Michigan,
Southern Division.

Pat O'Lear, Kay Ann Chase, Steve Borrello, Lawrence Kestenbaum, Charlie Harrison, III, James Larkin, Christopher Smith, Donald Rittering, Barbara Long, George Gaines, and Minnie H. Whiting,
Plaintiffs,
v.
Candice S. Miller and Christopher Thomas, Defendants,
and
Michigan Republican Party, Patrick Miller, Andrew Pettress, and James L. Palaske,
Defendant-Intervenors.

Case Number 01-72584-BC.

June 5, 2002.

ORDER DISMISSING SECOND AMENDED COMPLAINT WITH PREJUDICE AND DENYING EMERGENCY MOTION FOR EXPEDITED TRIAL AS MOOT

BOYCE F. MARTIN, JR., Chief Circuit Judge.

On May 24, 2002, this Court filed an Opinion and Order dismissing the third claim of the plaintiffs' amended complaint without prejudice, dismissing the remainder of the plaintiffs' claims with prejudice, and granting the plaintiffs leave to file an

amended complaint within thirty days. On May 29, 2002, the plaintiffs filed a Second Amended Complaint and an Emergency Motion for Expedited Trial, which sought a trial from June 4 through June 6, 2002, with a decision to be rendered by June 7, 2002.

The Court has reviewed the Second Amended Complaint, and finds that it, like its immediate predecessor, fails to state a claim under the Fourteenth Amendment to the United States Constitution upon which relief can be granted. In its Opinion and Order, this Court found that "disproportionate election results will not establish a constitutionally infirm districting plan without a showing of some substantial permanency to the arrangement that cannot be overcome through the political process." *O'Lear v. Miller,* No. 01-72584, 2002 WL 1052046, at *3 (E.D. Mich. May 24, 2002) (three-judge panel). The plaintiffs admit that Democrats may gain control of one or both houses of the Michigan legislature within the next decade, although they claim that the redistricting plan may make it more difficult for them to do so. Second Am. Compl. ¶ 55. Nonetheless, the pleading itself concedes that a political solution to their redistricting complaint is within reach by the next decade, or such other time as redistricting may lawfully occur at the direction of the state legislature.[1]

The plaintiffs' attempt to state a claim under the alternative test that their elected Republican representatives will be "indifferent" to their interests fares no better. Political gerrymandering does not offend the Fourteenth Amendment simply because certain voters are members of the minority party in the district. If so, every "safe" district would violate the Equal

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[1] There is no Michigan constitutional provision which prescribes the frequency with which redistricting must or may occur. That decision, like the districting process itself, is left to the state legislature.

Protection Clause. Rather, the plaintiffs must demonstrate that their interests will in fact be "entirely ignore[d]" by their representatives. *O'Lear*, 2002 WL 1052046 at *4. The plaintiffs themselves admit that their representatives are likely to "respond to constituent requests for assistance and will listen to constituents' expressions of views regardless of the party affiliation of the constituent involved." Second Am. Compl. ¶ ¶ 56-57.

The Court has the power to dismiss a complaint *sua sponte* pursuant to Rule 12(b)(6), provided that the plaintiffs have been given adequate notice and an opportunity to amend. *See Tingler v. Marshall*, 716 F.2d 1109, 1112 (6th Cir. 1983). The Court finds that the plaintiffs in this case received adequate notice through this Court's Opinion and Order dismissing of their equal protection claim without prejudice and with leave to amend. The plaintiffs having failed to submit an amended complaint upon which relief can be granted, this Court finds that *sua sponte* dismissal is appropriate.

Accordingly, it is ORDERED that the Second Amended Complaint [dkt # 97] is DISMISSED WITH PREJUDICE.

It is further ORDERED that the plaintiffs' Emergency Motion for Expedited Trial [dkt # 98] is DENIED AS MOOT.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PAT O'LEAR, DONALD RITTERING, KAY ANN CHASE, STEVE BORRELLO, LAWRENCE KESTENBAUM, JAMES LARKIN, BARBARA LONG, GEORGE GAINES, MINNIE H. WHITING, and CHRISTOPHER SMITH,

Plaintiffs,

v.

CANDICE S. MILLER, in her official capacity as Secretary of State for the State of Michigan, and CHRISTOPHER M. THOMAS, in his official capacity as Director of Elections for the State of Michigan,

Defendants,

and

THE MICHIGAN REPUBLICAN PARTY, PATRICK MILLER, ANDREW PETTRESS, and JAMES L. PALASKE,

Defendant-Intervenors.

Case No. 01-72584
Honorable Boyce F. Martin, Jr.
Honorable Julian Abele Cook, Jr.
Honorable David M. Lawson

NOTICE OF APPEAL OF PLAINTIFFS PAT O'LEAR, DONALD RITTERING, KAY ANN CHASE, STEVE BORRELLO, LAWRENCE KESTENBAUM, JAMES LARKIN, BARBARA LONG, GEORGE GAINES, MINNIE H. WHITING, AND CHRISTOPHER SMITH

Plaintiffs Pat O'Lear, Donald Rittering, Kay Ann Chase, Steve Borrello, Lawrence Kestenbaum, James Larkin, Barbara Long, George Gaines, Minnie H. Whiting, and Christopher Smith hereby appeal to the Supreme Court of the United States from the Order entered in this matter on June 5, 2002, dismissing Plaintiffs' claims of unconstitutional partisan gerrymandering. The appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,
BODMAN, LONGLEY & DAHLING LLP
By: /s/ WILLIAM B. FORREST
R. Craig Hupp (P36254)
F. Thomas Lewand (P16619)
William B. Forrest III (P60311)
100 Renaissance Center, 34th Floor
Detroit, Michigan 48243
(313) 259-7777
Co-Counsel for Plaintiffs

and

Paul M. Smith
Sam Hirsch
Marc A. Goldman
James A. Trilling
JENNER & BLOCK, LLC

601 Thirteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 639-6000
Co-Counsel for Plaintiffs

Dated: August 2, 2002

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PAT O'LEAR, DONALD RITTERING, KAY ANN CHASE, STEVE BORRELLO, LAWRENCE KESTENBAUM, JAMES LARKIN, BARBARA LONG, GEORGE GAINES, MINNIE H. WHITING, and CHRISTOPHER SMITH,

Plaintiffs,

v.

CANDICE S. MILLER, in her official capacity as Secretary of State for the State of Michigan, and CHRISTOPHER M. THOMAS, in his official capacity as Director of Elections for the State of Michigan,

Defendants,

and

THE MICHIGAN REPUBLICAN PARTY, PATRICK MILLER, ANDREW PETTRESS, and JAMES L. PALASKE,

Defendant-Intervenors.

Case No. 01-72584
Honorable Boyce F. Martin, Jr.
Honorable Julian Abele Cook, Jr.
Honorable David M. Lawson

SECOND AMENDED COMPLAINT

1. The plaintiffs – Pat O'Lear, Donald Rittering, Kay Ann Chase, Steve Borrello, Lawrence Kestenbaum, James Larkin, Barbara Long, George Gaines, Minnie H. Whiting, and Christopher Smith – have brought this action to enforce voting rights guaranteed to them by the United States Constitution and federal law. As Democratic voters in the State of Michigan, the plaintiffs have exercised, and wish to continue exercising, their right to vote for their preferred candidates for United States Representative. The Michigan Legislature, however, has deliberately redrawn district lines to maximize the number of Republicans likely to be elected in the 2002 congressional elections. The district lines virtually ensure that 9 or 10 Republicans will be elected to Michigan's 15 congressional seats for the next decade, and these Republican Representatives in turn are likely to ignore the interests of their Democratic constituents. While political concerns always play some role in the redistricting process, such partisan gerrymandering, in which partisan concerns have predominated over other traditional redistricting principles, violates the Equal Protection Clause of the Fourteenth Amendment.

PARTIES

2. Plaintiff Pat O'Lear resides in Sterling Heights city in Macomb County. His address is 8104 New Bradford, Sterling Heights, Michigan 48312. Prior to the 2001 redistricting, his home was in Michigan's Twelfth Congressional District. Under the 2001 plan, it is in Michigan's Tenth Congressional District.

3. Plaintiff Donald Rittering resides in Salem township in Washtenaw County. His address is 9706 Six Mile Road,

Northville, Michigan 48167. Prior to the 2001 redistricting, his home was in Michigan's Thirteenth Congressional District. Under the 2001 plan, it is in the Seventh Congressional District.

4. Plaintiff Kay Ann Chase resides in Charlevoix township in Charlevoix County. Her address is 12492 Pine Ridge, Charlevoix, Michigan 49720. Prior to the 2001 redistricting, her home was in Michigan's First Congressional District. It remains in the First Congressional District under the 2001 plan.

5. Plaintiff Steve Borrello resides in Saginaw city in Saginaw County. His address is 721 South Michigan Avenue, Saginaw, Michigan 48602. Prior to the 2001 redistricting, his home was in Michigan's Fifth Congressional District. It remains in the Fifth Congressional District under the 2001 plan.

6. Plaintiff Lawrence Kestenbaum resides in Ann Arbor city in Washtenaw County. His address is 1726 W. Stadium Boulevard, Ann Arbor, Michigan 48103. Prior to the 2001 redistricting, his home was in Michigan's Thirteenth Congressional District. Under the 2001 plan, his home is in Michigan's Fifteenth Congressional District.

7. Plaintiff James Larkin resides in Garden City in Wayne County. His address is 1021 West Rose, Garden City, Michigan 48185. Prior to the 2001 redistricting, his home was in Michigan's Thirteenth Congressional District. Under the 2001 plan, his home is in Michigan's Eleventh Congressional District.

8. Plaintiff Christopher Smith resides in Lincoln Park city in Wayne County. His address is 950 Moran, Lincoln Park, Michigan 48146. Prior to the 2001 redistricting, his home was in Michigan's Sixteenth Congressional District. Under the 2001 plan, his home is in Michigan's Thirteenth Congressional District.

9. Plaintiff Barbara Long resides in Detroit city in Wayne County. Her address is 11730 Rosemont, Detroit, Michigan 48228. Prior to the 2001 redistricting, her home was in Michigan's Fourteenth Congressional District. Under the 2001 plan, her home is in Michigan's Fourteenth Congressional District.

10. Plaintiff George Gaines resides in Detroit city in Wayne County. His address is 1531 Chateaufort, Detroit, Michigan 48207. Prior to the 2001 redistricting, his home was in Michigan's Fifteenth Congressional District. Under the 2001 plan, his home is in Michigan's Thirteenth Congressional District.

11. Plaintiff Minnie H. Whiting resides in Pontiac city in Oakland County. Her address is 137 E. Iroquois, Pontiac, Michigan 48341. Prior to the 2001 redistricting, her home was in Michigan's Ninth Congressional District. Under the 2001 plan, her home is in Michigan's Ninth Congressional District.

12. Defendants are Candice S. Miller, the Secretary of State for the State of Michigan, and Christopher Thomas, the Director of Elections for the State of Michigan. Both defendants are sued in their official capacities.

JURISDICTION AND VENUE

13. This Court has jurisdiction over this action pursuant to 28 U.S.C. § § 1331, 1343(a)(3), 1343(a)(4), 1357, 2201, 2202 and 2284. Venue is proper in this district under 28 U.S.C. § 1391(b).

BASIS OF CLAIMS

14. On July 11, 2001, on a straight party-line vote in the Michigan Senate and an almost straight party-line vote in the Michigan House of Representatives, the Republican majorities in

Michigan's legislative chambers passed a congressional redistricting plan ("the Republican Plan") that will radically alter the partisan balance of Michigan's congressional delegation. At present, Michigan has nine Democratic and seven Republican Representatives in Congress. Under the new plan, Michigan is likely to have only five or six Democratic Representatives and nine or ten Republican Representatives for the next decade. (As a result of the 2000 census, Michigan is now entitled to only fifteen congressional seats). Thus, based entirely on redrawing of district lines, the number of Democratic Representatives is likely to decrease by at least one-third.

I. The Republicans Violated State Law In Order To Pass A Partisan Gerrymander.

15. In passing the Republican Plan, the Republicans deviated from the nonpartisan criteria they themselves had helped to establish when they passed the Congressional Redistricting Act of 1999, P.A. 221. Because they could not achieve their desired partisan ends consistent with these criteria, the Republicans "reinterpreted" these criteria in the legislation that included the Republican Plan. This "reinterpretation" violated the Michigan Constitution's mandate that no Act shall take effect immediately unless passed by a two-thirds vote of each house. Mich. Const. art. 4, § 27 ("No Act shall take effect until the expiration of 90 days from the end of the session at which it was passed, but the legislature may give immediate effect to acts by a two-thirds vote of the members elected to and serving in each house."). It also violated the rule against amendment by reference ("No law shall be revised, altered or amended by reference to its title only. The section or sections of the act altered or amended shall be re-enacted and published at length." Mich. Const. art. 4, § 25) and the "two subject rule" ("No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or

amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title." Mich. Const. art. 4, § 24). The Legislature's willingness to violate the Michigan Constitution underscores the extent to which the Republican Plan was based on partisan considerations.

16. In 1999, the Republicans controlled both houses of the Michigan Legislature, as well as the governorship. As will be set forth below, however, the Republicans understood that Michigan was becoming increasingly Democratic and thus there was a significant chance that Democrats would control at least one legislative chamber at the time of redistricting in 2001. They therefore passed the Congressional Redistricting Act to limit the role of partisan considerations in redistricting. The Act established very specific criteria for congressional redistricting in addition to compliance with federal law. It prioritized those criteria and placed at the top of the priority list that "[e]ach congressional district shall consist of areas of convenient territory contiguous by land," and, after contiguity, that "[c]ongressional district lines shall break as few county boundaries as is reasonably possible." Mich. Comp. Laws § 3.63(c). The Act also provided, further down the priority list, that "[c]ongressional district lines shall break as few city and township boundaries as is reasonably possible." *Id.*

17. The Republican Plan violates these criteria by breaking ten county boundaries and fourteen city or township boundaries when it is "reasonably possible" to draw an alternative redistricting plan that breaks only five county boundaries and ten city or township boundaries. During the legislative session, Democrats introduced a plan that breaks only five county boundaries and ten city or county boundaries. This plan also does not pair in the same district any incumbents seeking reelection and more accurately

reflects the political makeup of the State. (One Democratic incumbent intends to run for Governor, so only fifteen incumbents – eight Democrats and seven Republicans – are seeking reelection.) Nonetheless, this alternative plan was defeated on the floor of the House on July 11, 2001, on a party-line vote (with the exception of one Republican who joined Democrats in supporting the plan).

18. In 1999, when the Legislature passed the Congressional Redistricting Act, it believed that this Act would bind the 2001 Legislature that would control redistricting. As explained above, the Michigan Constitution forbids implementation of legislation until 90 days after conclusion of a legislative session, in the absence of a two-thirds vote. Thus, without a two-thirds vote, the 2001 Legislature could not change the 1999 criteria for enacting a redistricting plan and immediately use those criteria as the basis for enacting a new redistricting plan. Even if the Legislature changed the criteria, the 1999 criteria would apply to 2001 redistricting efforts.

19. Nonetheless, because the Republican Plan clearly violates the statutory criteria set forth in the Congressional Redistricting Act, the 2001 Legislature redefined those criteria under the guise of interpretation. The legislation that includes the Republican Plan first states that "[i]t is the intention of the Legislature to comply fully with section 3 of the Congressional Redistricting Act, 1999 P.A. 221, MCL 3.63," which requires congressional district lines to break as few county boundaries (and as few city or township boundaries) as possible. But it then defines the number of county breaks in the redistricting plan as follows:

> (i) Breaking a county line means assigning part of the population of a county to 1 or more counties in the formation of a district.

(ii) If population is shifted from a county to a single election district, including a district from 2 geographically-separate areas, there is 1 break. Except as provided in subparagraph (iii), if population from a county is shifted to 2 or more election districts, there are 2 or more breaks.

(iii) If 1 part of a county is shifted to a district and the rest of the county is shifted to another district, there is 1 break.

To the extent they are comprehensible, these provisions appear to have been designed to justify the Republican Plan and thus must have been intended to govern the enactment of that very Plan. In other words, they were intended to have immediate effect. But the Republicans knew that they did not have the two-thirds majority needed for immediate implementation of the new criteria, and indeed, a Senate vote on whether the legislation should have immediate effect failed to garner the necessary two-thirds vote. The Republicans therefore attempted to circumvent the constitutional requirement for such a two-thirds vote by labeling the new statutory criteria as merely an "interpretation" of existing criteria. Yet the new provisions do not merely interpret the 1999 Act's redistricting criteria; they completely change them and thus required a two-thirds vote that they did not receive. The new redistricting criteria were therefore not in effect when the Republicans enacted the Republican Plan. The 1999 criteria were controlling.

20. The Republicans' willingness to deviate from the nonpartisan redistricting criteria they enacted in 1999 and to circumvent the Michigan Constitution in the process demonstrate that partisanship was the dominant motivation for the Republican Plan. This is also shown by the Republicans' willingness to violate the constitution in other ways. Passage of new redistricting

criteria in the same legislation as a redistricting plan, without re-publication of existing redistricting criteria, violates Michigan's constitutional rules against amendment by reference and inclusion of two subjects in the same law.

II. The Republicans Were Unwilling To Subject Their Redistricting Plan To Public, Or Legislative, Deliberation.

21. The partisan motivation for the Republican Plan is further emphasized by the manner in which that plan was shepherded through the Legislature with little opportunity for evaluation or for presentation of alternative plans. When the Michigan Legislature passed the Congressional Redistricting Act in 1999, it understood the importance of careful deliberation and public input during the redistricting process. It therefore provided that the Legislature "shall enact a redistricting plan for congressional districts" "[n]ot later than *November 1, 2001*." Mich. Comp. Laws § 3.62 (emphasis added). The November 1, 2001 deadline allowed seven months for careful deliberation after receipt of the 2000 census data (which, by federal law, must take place by April 1), while still ensuring that any courts reviewing the redistricting plan would have sufficient time to consider that plan and devise an alternative, if necessary, before the 2002 congressional election cycle gets underway.

22. Michigan law further emphasizes the importance of deliberation and public input in the redistricting process by building in a public comment period during the state judicial phase of the redistricting process. In particular, the law provides that in the event the Legislature is unable to agree on a redistricting plan, the Michigan Supreme Court shall propose a plan for public consideration and "make that plan available for public inspection

at least 30 days before the time set for [a] hearing." Mich. Comp. Laws § 3.74.

23. Federal law also requires a deliberative process. The Voting Rights Act of 1965 prohibits enactment of any redistricting plan that would abridge the right to vote based on race or ethnicity. In reviewing a Michigan redistricting plan under the Voting Rights Act, the Justice Department (or the District Court for the District of Columbia) will consider the "extent to which the [Michigan Legislature] followed objective guidelines and fair and conventional procedures" in enacting the new map, the "extent to which the [Legislature] afforded members of racial and language minority groups an opportunity to participate" in the decision-making process, and the "extent to which the [Legislature] took the concerns of members of racial and language minority groups into account." 28 C.F.R. § 51.57. A process that departs from normal legislative procedures and excludes African-Americans and other minorities from full participation risks rejection by the Justice Department or D.C. District Court.

24. Initially, the Republicans appeared to understand the value that Michigan and federal law places on deliberation and public participation in the redistricting process. When the census data were released in March 2001, the Republican leadership of the Michigan Legislature announced a "framework for redistricting" that included "public hearings across Michigan this summer, with the goal of passing a redistricting plan in the fall." Press Release from the Office of Senate Majority leader Dan L. DeGrow, "Michigan 2000 Census Figures Released: New Legislative Districts to be Developed" (Mar. 28, 2001) (quoting Sen. DeGrow and Sen. Schuette). This schedule provided sufficient time for presentation of alternative plans and reasoned consideration of these plans while nonetheless ensuring that a redistricting plan could be adopted by the Legislature and upheld by the courts well

before the congressional candidates would have to file for the 2002 congressional elections.

25. The Republican leadership later abandoned its proposal for a deliberative process, and instead announced on Friday, June 8, that "organizations and/or interested persons have until noon, Monday, June 18 to submit prepared plans, voting data, or legal analyses relevant to legislative and congressional redistricting." Press Release from the Office of Senate Majority Leader Dan L. DeGrow, "Legislative Redistricting Input Sought" (June 8, 2001) (quoting Sen. DeGrow and Sen. Schuette). The Senate Majority leadership later granted a one-week extension – until noon on June 25 – for submission of plans. Even with this additional week, there was still very little time for interested parties to engage in the complicated process of drawing maps and ensuring that they complied with all of the necessary legal requirements.

26. Not only did the Republican leadership provide little time for submission of alternative redistricting plans, it provided others little time for consideration of its own plan. When the Republicans first introduced a redistricting bill, on June 14, 2001, they introduced a shell bill that eliminated old congressional-district lines without proposing any new districts. *See* Senate Bill 546 (as introduced, June 14, 2001). The bill was referred to the Committee on Reapportionment that same day.

27. The Republicans did not publicly release the Republican Plan until 1:00 p.m. on June 25, 2001 – *after* the artificial deadline established by the Senate Majority leadership for introduction of plans had expired. The Republicans introduced the plan on the afternoon of June 25 even though the map was likely available far earlier. The Republican staff person who drew the map testified to the Senate Reapportionment Committee that she did so before political data were loaded onto the State's redistricting computers.

Since these data were loaded in April 2001, her testimony suggests that she drew the map at least two months before it was publicly released.

28. On June 25, the Senate Committee on Reapportionment held the first and only hearing at which it discussed specific congressional maps, and it was at this hearing that the Republicans introduced the Republican Plan. The Committee ensured there would be little public participation at this hearing by waiting until the afternoon of Friday June 22 to call the hearing. As a result, the only public participant at the hearing was the Executive Director of the Detroit Chapter of the National Association for the Advancement of Colored People ("NAACP").

29. The Republicans further limited public participation – and analysis of the Republican Plan by the public or by Democrats – through the manner in which they presented the bill. The bill did not include a pictorial representation of the proposed districts. Instead, the bill consisted of a list of counties, cities, and or townships in each district. When only part of a city or township was included in a district, the bill designated the included areas based on the six-digit census-tract numbers and four-digit census-block numbers of those areas. The bill was 167 pages long. Thus, the exact boundaries of each district could only be determined by analyzing thousands of census tract and block numbers – a task that is virtually impossible without a computer.

30. The Senate Republicans refused to provide the proposed map in electronic form even after they were asked to do so. Thus, before the map could be analyzed, the thousands of block numbers had to be manually entered into a computer. Not surprisingly, the Republicans' desire to preclude Democrats and the public from readily analyzing the Republican Plan, and their resultant unwillingness to provide the map in electronic form, resulted in a

major mistake that was not discovered until after both the Senate and House had already passed the Plan, as is set forth below. In other states, it is routine practice for maps to be provided in electronic form to legislators from both political parties – and even to be placed on the World Wide Web for public inspection.

31. The NAACP asked for a 30-day extension to evaluate the map. This request was rejected.

32. The Committee voted in favor of the plan on June 25, 2001, and the full Senate voted to pass the proposed plan on June 26, 2001. Thus, the Senate passed the Republican Plan only a day after it was first introduced. Both in committee and on the floor, votes divided perfectly along party lines, with Republicans voting in favor and Democrats in opposition.

33. The bill moved to the House, where the Committee on Redistricting and Elections met on July 10, 2001, to consider the Senate plan. The House had only one day to consider the plan and reach an agreement with the Senate, as the legislative session was scheduled to end on July 11, 2001. Committee hearings and floor debate were minimal. The Committee heard limited testimony at its July 10 hearing, all of it in opposition to the Republican Plan, but it summarily ignored this testimony. The Committee Chair also summarily dismissed the questions of Democratic committee members on the plan, by either indicating that he did not know the answers to the questions or stating that the members should obtain the answers from Democratic staff. At roughly 11:00 p.m. on July 10, the Committee voted to approve the Republican Plan on a straight-party line vote.

34. The full House considered the Republican Plan well after midnight on the morning of July 11, 2001 – not a time when public scrutiny or rigorous debate was likely to occur. At roughly

2:35 a.m., the House passed the plan on a straight party-line vote (with the exception of one Republican who joined the Democrats because the Republican Plan diluted the political influence of Dearborn's growing Arab-American population) after first rejecting two Democratic alternatives (with the same Republican again the only Representative to break party lines).

35. Later on July 11, the House asked the Senate to return the redistricting bill because it contained a blatant error. The Fifteenth Congressional District was noncontiguous: To traverse it, one would have to leave the Fifteenth and enter the Seventh Congressional District. Thus, the plan passed by both houses violated the *highest*-priority state criterion under the 1999 Congressional Redistricting Act. Democrats and members of the public did not catch the error prior to passage because the Republicans rushed the bill through the Legislature and refused to provide an electronic version of their map. Republicans did not catch the error because they were concerned predominantly with the partisan implications of the Republican Plan and apparently never even analyzed the Plan carefully to determine its compliance with the 1999 Act.

36. When the bill containing the Republican plan was returned to it on July 11, the House amended the bill to make the Fifteenth District contiguous, again passed the bill along party lines (with the same lone Republican dissenter) and returned it to the Senate. The Senate then passed the amended bill, again dividing perfectly along party lines.

37. The bill contained another blatant error, however. Four thousand people were not placed into *any* district in the bill. Thus, the bill plainly violated the principle of one person, one vote. (The state legislative redistricting plan contained a similar but lesser error – one unpopulated census tract was not placed in any

district). Once again, no legislators caught this error because of the rush to enact the Republican Plan. By the time this error became apparent, the Legislature was out of session and was not scheduled to return until September.

38. Senate Secretary Carol Viventi was therefore faced with a choice: presenting the Republican Plan to the Governor despite the blatant error, correcting the error herself, or waiting until the Legislature returned in September and sending the bill back to the Legislature for amendment. Sending the bill back to the Legislature, however, would have opened up the possibility of further debate on the Republican Plan. The Republican leadership and Governor Engler did not wish to open up any such possibility.

39. After a series of meetings with Republican leaders, Secretary Viventi concluded that she had the authority to correct the Republican Plan herself under Joint Rule 12 . That rule states that, "[i]f errors are found in a bill which has been passed by both Houses, the House in which the bill originated may make amendments to correct the errors and shall notify the other House of its action. If the corrective amendments are agreed to by the other House, the corrected bill shall be referred for enrollment printing and presentation to the Governor." Secretary Viventi apparently concluded that this Rule gave her authority to add four thousand people to a congressional district without the approval of either House because the correction was merely "technical" in nature. (In contrast, the Clerk of the House, who controlled presentment of the state legislative redistricting plan to the Governor, apparently concluded that Rule 12 did not provide him authority to correct the similar – but lesser – problem with the state legislative redistricting plan and did not correct that plan.)

40. On September 11, nearly two months after passage of the Republican Plan, Secretary Viventi corrected the Plan and

presented it to the Governor. The Governor signed the bill containing the Republican Plan at 4:54 p.m. on Tuesday, September 11, 2001. Although the Michigan Supreme Court ultimately concluded that Secretary Viventi's actions were permissible, *LeRoux v. Secretary of State*, 640 N.W.2d 849 (Mich. 2002), the fact remains that there was a substantial question as to the legality of her action as evidenced by the dissent in the Michigan Supreme Court. If Secretary Viventi had waited only a couple more weeks, she could have returned the bill to the Legislature to correct the Plan itself. But Republicans wanted to avoid further consideration by the Legislature.

41. Thus, the Republicans short-circuited the deliberative process. The passage of a plan containing two blatant and fundamental errors demonstrates how little deliberation occurred and shows that members voted on a bill the contents of which they cannot have understood. This is further underscored by the unwillingness of Republicans to open up the plan for further deliberation by correcting it through the ordinary legislative process. The Republicans passed the Plan because they had already agreed internally on that plan and felt no need for input from Democrats or from the public.

42. Indeed, the Republicans remained unwilling to consider alternative plans. Once the Democrats came to understand the interpretation of the 1999 Congressional Redistricting Act adopted by the 2001 Legislature, they introduced a plan in the Legislature that better meets even the reinterpreted criteria. Whereas 2001 PA itself states that the Republican Plan breaks eleven counties, see 2001 PA 115, § 4(e)(ii), the Defendant Intervenors have conceded that the Democrats introduced a redistricting plan in both the Michigan House and Senate on October 17, 2001 (the "Second Alternative Plan") that breaks only 10 counties under the 2001 PA 115's counting methodology. *See* Mich. Sup. Ct. Tr. at 29 (Jan.

23, 2001). In addition, the Defendant-Intervenors have stated that the Republicans' Plan breaks 14 cities or townships under 2001 PA 115's counting methodology, *see* Int. Br. at 61 (Mich. Sup. Ct. Jan 11, 2002), and that the Second Alternative Plan breaks only 12. *See* Mich. Sup. Ct. Tr. at 29 (Jan. 23, 2001).

43. Because the 1999 Act provided the Michigan Legislature until November 1, 2000 to enact a congressional redistricting plan, see Mich. Comp. Laws § 3.62, the Second Alternative Plan was introduced in the Legislature with sufficient time for its enactment. Nonetheless, the Republican leadership held it up in the House Committee on Redistricting and Elections and refused to allow a roll call vote on Democratic Vice Chair Nancy Quarles's motion to discharge the bill to the full House. The Republicans' extensive efforts to create, pass, and preserve the enactment of the Republican Plan despite its deviation from the nonpartisan redistricting criteria set forth in the 1999 Act is evidence of the partisan motivations underlying the Republican Plan.

44. Because the Republican Plan so clearly violates the 1999 Act, three Michigan voters who reside and vote in counties and municipalities that the Plan needlessly divides filed a challenge to the Plan in the Michigan Supreme Court in November 2001. There, the voters asked the court to declare 2001 PA 115 void and invalid (1) because it violates the 1999 Act by breaking more city, county, and municipal boundaries than is reasonably necessary, and (2) because Senate Secretary Viventi's changes to the bill caused Governor Engler to sign a bill on September 11, 2001 that differed from the bill that the Legislature passed on July 11, in violation of Article 4, sections 1 and 26 of the Michigan Constitution of 1963. The plaintiffs in the Michigan Supreme Court sought to enjoin the same officials who are Defendants here from holding elections under the Republican Plan and, pursuant to Mich. Comp. Laws § 3.74, asked the court to ensure the adoption

of a lawful congressional redistricting plan not later than April 1, 2002. After receiving briefs in the case, the court held oral argument on January 23, 2002. On March 25, 2002, a divided court held that the nonpartisan redistricting criteria set forth in the 1999 Act were not binding on the 2001 Michigan Legislature, and therefore ruled in favor of the defendant parties without resolving the question whether 2001 PA 115 violates them.

45. The fact remains, however, that the 2001 Legislature did violate those criteria. Regardless of whether those criteria were binding on the Legislature, the Legislature's willingness to disregard the criteria adopted by the 1999 Legislature – and even the reinterpreted criteria included in the 2001 legislation – underscores just how skewed the Republican Plan is.

46. In fact, Republicans repeatedly made clear in press reports that they intended to use their control of the state legislature and governorship to pass a redistricting plan aimed to benefit Republicans. That is what they did.

III. The Republican Plan Is Severely Biased Against Democrats

47. In general, Michigan is a politically competitive State that leans Democratic in federal elections. Michigan has voted for the Democratic candidate for President in each of the last three presidential contests, with the Republican candidate twice failing to capture even 40% of the statewide vote Both of its U.S. Senators are Democrats. At present, nine of Michigan's sixteen Representatives are Democrats.

48. The current makeup of Michigan's congressional delegation is not an artifact of any bias in the current congressional districting plan. The current districts were drawn in 1992 by a

federal district court of three judges – Sixth Circuit Judge Ryan and District Judges Newblatt and Bell. *See Good v. Austin*, 800 F. Supp. 551 (E.D. & W.D. Mich. 1992). In the most recent elections conducted under that plan, in November 2000, the Democratic congressional candidates received nearly 400,000 more votes than their Republican opponents (54.8% to 45.2% of the major-party vote) and that closely approximates the number of congressional seats they control (9 out of 16 seats is 56.3%).

49. The Michigan electorate has been trending Democratic in recent years. In 1996, Democrats carried the statewide congressional vote by seven percentage points (53.5% to 46.5%). In the 2000 elections, the margin was more than nine percentage points. In 1996 and 2000, the Democratic presidential candidates won by nearly five points more in Michigan than elsewhere in the country. In contrast, in 1984 and 1988, the Republican presidential candidates had won Michigan and had done so by larger margins than they did nationwide.

50. Despite the increasingly Democratic nature of the Michigan electorate in national elections, under the Republican Plan, Republicans are very likely to win nine or even ten of the fifteen congressional seats. This is apparent from analyzing the results of past elections based on the districts drawn in the Plan. Democratic presidential candidate Al Gore carried Michigan by approximately five points statewide. Thus, in a non-partisan redistricting plan, Al Gore would have carried slightly over half the congressional districts. Yet Republican presidential candidate George W. Bush carried ten of the fifteen congressional districts drawn in the Republican Plan. This is because the maximum number of Democrats were packed into just five districts – each of which Al Gore carried by at least 23 points. In contrast, under the court-drawn congressional districting plan put in place in 1992 ("the 1992 Plan"), Al Gore carried ten of sixteen congressional

districts, far more accurately reflecting the percentage of the statewide vote that he won.

51. Similarly, while Democratic senatorial candidate Debbie Stabenow won the U.S. Senate race in 2000 with just over half of the major-party statewide vote, she would have carried only five of the fifteen congressional districts under the Republican Plan – not surprisingly, the same five districts that Al Gore would have carried. In contrast, she would have carried nine out of sixteen districts under the 1992 Plan – a result consistent with her narrow victory statewide.

52. The partisan nature of the Republican Plan is also reflected in the pairing of current incumbents. While all seven Republican incumbents reside in separate districts under the Republican Plan, six of the nine Democratic incumbents are paired against each other. Congressman John Dingell of Dearborn and Congresswoman Lynn Rivers of Ann Arbor both reside in the new Fifteenth District. Congressman Dale Kildee of Flint and Congressman James Barcia of Bay City both reside in the new Fifth District. And Congressman David Bonior of Mount Clemens and Congressman Sander Levin of Royal Oak both reside in the new Twelfth District. (Congressman Bonior has announced his intention to retire from Congress and run for Governor.)

53. Thus, although there are currently nine Democratic incumbents and seven Republican incumbents, under the Republican Plan only six districts contain the homes of Democratic incumbents. Seven districts contain the home of Republican incumbents. Two districts (the Tenth and the Eleventh) contain the homes of no incumbents – an odd result in a State that is losing one congressional seat to reapportionment.

51. As a result of the packing of Democrats into five districts and the pairing of Democratic incumbents, the Republican Plan will result in the continued and systemic frustration of the will of a majority of the voters. The Republican Plan is so skewed in favor of Republican congressional candidates that it virtually ensures Republican control of the Michigan congressional delegation for the next decade. Based on analysis of 27 statewide election contests between 1994 and 2000, the Republican Plan creates 10 Republican-leaning seats and only 5 Democratic-leaning seats. Moreover, of the 10 Republican-leaning seats, 9 lean strongly Republican. Even if Democrats captured a mean of 55 percent of the statewide vote, they would likely capture only 40 percent of the seats (9 of 15). The substantial Republican advantage in these districts is likely to remain intact for the next decade, as the overall partisan leanings of the various districts is unlikely to change significantly.

54. Incumbency only strengthens the likelihood of continued Republican control. Of the 9 strongly Republican districts under the Republican Plan, 7 contain Republican incumbents, as the Republican Plan protects all current Republican incumbents. The other two strongly Republican districts have open seats. These districts were drawn for particular Republican candidates who have significant advantages in these districts.

55. The Republican Legislature took steps to ensure Republican control of Michigan's congressional delegation even after a new round of redistricting. The Legislature drew state legislative redistricting plans that, like the congressional plan, benefit Republicans. Although the state legislative plans are not as severely gerrymandered as the congressional plan and thus create a realistic possibility that Democrats will gain control of the Michigan House and/or Senate within the next decade, these plans nonetheless make it more difficult for Democrats to do so and thus

reduce the likelihood they will be in control during the next round of redistricting.

56. The impact of Republican control of the Michigan congressional delegation on Michigan Democrats will be substantial over the course of the next decade. Republican Representatives – especially those in the nine strongly Republican districts – will be indifferent to the dissenting views of Democratic constituents. Republican Members of the Michigan congressional delegation have far different voting records than Democratic Members. In general, a Michigan voter who votes for a Democratic Congressman is far less likely to be effectively represented by a Republican than a Democrat. The Republican Representative will be far less likely than a Democratic Representatives to press for and vote for legislation that is consistent with the views of the Democratic voter.

57. This is particularly true because 9 of the 15 Republican-leaning districts in the Republican Plan are non-competitive. Although Members of Congress from Michigan respond to constituent requests for assistance and will listen to constituents' expressions of views regardless of the party affiliation of the constituent involved, the actual voting behavior of Republican Members will not be significantly affected by the views of Democratic voters whom they know are not sufficiently numerous in their districts to threaten their reelection chances. Moreover, in non-competitive districts, Representatives will also be less response in the provision of constituent service than they would otherwise be.

58. The severely partisan nature of the Republican plan was entirely unnecessary. The three plans introduced by the Democrats in the Michigan Legislature pair fewer incumbents, more accurately reflect the political makeup of the State, and better

accord with the nonpartisan criteria set forth in the 1999 Congressional Redistricting Act. The First Alternative Plan, offered on the floor of the Michigan House as the Kilpatrick substitute, breaks only five county boundaries, far fewer than the ten boundaries broken in the Republican Plan. It also pairs only two incumbents. Democrat David Bonior, who plans to retire from Congress, is paired with Republican Joe Knollenberg in a Republican-leaning district. Finally, it accurately reflects the makeup of the State's electorate. Al Gore, who carried Michigan by roughly 5 percentage points, would have won 53.3% of the districts under this plan (in contrast to 33.3% under the Republican Plan). Nonetheless, on July 11, 2001, the House rejected this plan on a straight party-line vote (with the exception of a single Republican who joined Democrats in supporting the plan).

59. The Democrats also introduced another redistricting plan in July, the Democrats Other July Plan, that accords with the Republicans' bizarre reinterpretation of the 1999 Act. This plan breaks the same number of county boundaries as the Republican Plan using the Republicans' unique method of counting – or perhaps fewer depending on the precise meaning of the Republicans' method. This plan is not partisan, however. It pairs four incumbents – two Democrats in one district and two Republicans in another – in contrast to the six Democrats and zero Republicans paired in the Republican Plan. It also more accurately reflects the political makeup of the State. Al Gore would have carried 46.7% of the districts (7 out of 15) under this plan. The House also rejected this plan on a straight party-line vote.

60. The Democrats also introduce the Second Alternative Plan in October. This plan breaks fewer county and municipal boundaries than the Republican Plan even under the Republican interpretation. This plan is also not partisan. Although it pairs

four Republican incumbents in two districts, it creates two open seats that are Republican leaning. Indeed, 8 of 15 districts under this Plan lean Republican.

61. Thus, the Republicans rejected alternative plans and rammed through their own plan even though it deviated sharply from preexisting statutory criteria and required a significant revision of those criteria in violation of the Michigan Constitution. Clearly, partisan concerns predominated. As the Chairman of the House Redistricting and Election Committee Bruce Patterson explained to the *Detroit NEWS,* in April when asked if the Republicans intended to adopt a plan to create a 9-to-6 Republican majority, "If 9-6 is doable and within the rules, why wouldn't I go with that?" Mark Hornbeck & Charlie Cain, *Oakland Key to Redistricting*, DETROIT NEWS at A1, Wednesday, April 25, 2001. Indeed, the Republicans apparently believed that if 9-6, or 10-5, was "doable" they should go with that even if it was *not* within the rules.

CLAIM I

62. Plaintiffs incorporate by reference Paragraphs 1 through 50.

63. The facts herein alleged constitute a denial to plaintiffs of the equal protection of the laws as guaranteed to them by the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this Court:

A. Enter a declaratory judgment that the congressional districting plan that the Michigan Legislature enacted in July 2001 violates plaintiffs' rights under the aforesaid provisions of the United States Constitution;

B. Enjoin permanently the defendants, their officers, agents, employees, attorneys, successors in office, and all persons in active concert or participation with them, from conducting primary, general, or special elections using the 2001 congressional districting plan or any other congressional districting plan that violates the United States Constitution or federal law;

C. Impose by Court order a new congressional redistricting plan that meets the requirements the United States Constitution and federal and state law;

D. Grant plaintiffs their reasonable attorneys' fees, litigation expenses, and court costs; and

E. Grant plaintiffs any other relief that the Court finds appropriate and equitable.

Respectfully submitted,

BODMAN, LONGLEY & DAHLING LLP

By: /s/ WILLIAM B. FORREST

R. Craig Hupp (P36254)
F. Thomas Lewand (P16619)
William B. Forrest III (P60311)
100 Renaissance Center, 34th Floor
Detroit, Michigan 48243
(313) 259-7777
Co-Counsel for Plaintiffs

and

Paul M. Smith
Sam Hirsch
Marc A. Goldman
James A. Trilling
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W., Suite 1200
Washington, D.C. 20005
(202) 639-6000
Co-Counsel for Plaintiffs

Dated: May 29, 2002

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

PAT O'LEAR, DONALD RITTERING, KAY ANN CHASE, STEVE BORRELLO, LAWRENCE KESTENBAUM, JAMES LARKIN, BARBARA LONG, GEORGE GAINES, MINNIE H. WHITING, and CHRISTOPHER SMITH, Jr. Plaintiffs, v. CANDICE S. MILLER, in her official capacity as Secretary of State for the State of Michigan, and CHRISTOPHER THOMAS, in his official capacity as Director of Elections for the State of Michigan, Defendants.	THREE-JUDGE COURT REQUESTED Civil Action No. 01-72584 Hon. Julian Abele Cook, Magistrate Judge Scheer

AMENDED COMPLAINT

1. The plaintiffs – Pat O'Lear, Donald Rittering, Kay Ann Chase, Steve Borrello, Lawrence Kestenbaum, James Larkin, Barbara Long, George Gaines, Minnie H. Whiting, and Christopher Smith – have brought this action to enforce voting rights guaranteed to them by the United States Constitution and federal law. As registered Democrats in the State of Michigan, the plaintiffs have exercised, and wish to continue exercising, their right to vote for their preferred candidates for United States Representative. The Michigan Legislature, however, has deliberately redrawn district lines to maximize the number of Republicans likely to be elected in the 2002 congressional elections. While political concerns always play some role in the redistricting process, such partisan gerrymandering, in which partisan concerns have predominated over other traditional redistricting principles, violates Article I's requirement that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the Several States," as well as the First, Fourteenth, and Fifteenth Amendments. The congressional redistricting plan also improperly dilutes the power and influence of African-American voters in violation of the Voting Rights Act.

PARTIES

2. Plaintiff Pat O'Lear resides in Sterling Heights city in Macomb County. His address is 8104 New Bradford, Sterling Heights, Michigan 48312. Prior to the 2001 redistricting, his home was in Michigan's Twelfth Congressional District. Under the 2001 plan, it is in Michigan's Tenth Congressional District.

3. Plaintiff Donald Rittering resides in Salem township in Washtenaw County. His address is 9706 Six Mile Road, Northville, Michigan 48167. Prior to the 2001 redistricting, his

home was in Michigan's Thirteenth Congressional District. Under the 2001 plan, it is in the Seventh Congressional District.

4. Plaintiff Kay Ann Chase resides in Charlevoix township in Charlevoix County. Her address is 12492 Pine Ridge, Charlevoix, Michigan 49720. Prior to the 2001 redistricting, her home was in Michigan's First Congressional District. It remains in the First Congressional District under the 2001 plan.

5. Plaintiff Steve Borrello resides in Saginaw city in Saginaw County. His address is 721 South Michigan Avenue, Saginaw, Michigan 48602. Prior to the 2001 redistricting, his home was in Michigan's Fifth Congressional District. It remains in the Fifth Congressional District under the 2001 plan.

6. Plaintiff Lawrence Kestenbaum resides in Ann Arbor city in Washtenaw County. His address is 1726 W. Stadium Boulevard, Ann Arbor, Michigan 48103. Prior to the 2001 redistricting, his home was in Michigan's Thirteenth Congressional District. Under the 2001 plan, his home is in Michigan's Fifteenth Congressional District.

7. Plaintiff James Larkin resides in Garden City in Wayne County. His address is 1021 West Rose, Garden City, Michigan 48185. Prior to the 2001 redistricting, his home was in Michigan's Thirteenth Congressional District. Under the 2001 plan, his home is in Michigan's Eleventh Congressional District.

8. Plaintiff Christopher Smith resides in Lincoln Park city in Wayne County. His address is 950 Moran, Lincoln Park, Michigan 48146. Prior to the 2001 redistricting, his home was in Michigan's Sixteenth Congressional District. Under the 2001 plan, his home is in Michigan's Thirteenth Congressional District.

9. Plaintiff Barbara Long resides in Detroit city in Wayne County. Her address is 11730 Rosemont, Detroit, Michigan 48228. Prior to the 2001 redistricting, her home was in Michigan's Fourteenth Congressional District. Under the 2001 plan, her home is in Michigan's Fourteenth Congressional District.

10. Plaintiff George Gaines resides in Detroit city in Wayne County. His address is 1531 Chateaufort, Detroit, Michigan 48207. Prior to the 2001 redistricting, his home was in Michigan's Fifteenth Congressional District. Under the 2001 plan, his home is in Michigan's Thirteenth Congressional District.

11. Plaintiff Minnie H. Whiting resides in Pontiac city in Oakland County. Her address is 137 E. Iroquois, Pontiac, Michigan 48341. Prior to the 2001 redistricting, her home was in Michigan's Ninth Congressional District. Under the 2001 plan, her home is in Michigan's Ninth Congressional District.

12. Defendants are Candice S. Miller, the Secretary of State for the State of Michigan, and Christopher Thomas, the Director of Elections for the State of Michigan. Both defendants are sued in their official capacities.

JURISDICTION AND VENUE

13. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), 1343(a)(4), 1357, 2201, 2202 and 2284. Venue is proper in this district under 28 U.S.C. § 1391(b).

BASIS OF CLAIMS

14. On July 11, 2001, on a straight party-line vote in the Michigan Senate and an almost straight party-line vote in the Michigan House of Representatives, the Republican majorities in

Michigan's legislative chambers passed a congressional redistricting plan ("the Republican Plan") that will radically alter the partisan balance of Michigan's congressional delegation. At present, Michigan has nine Democratic and seven Republican Representatives in Congress. Under the new plan, Michigan is likely to have only five or six Democratic Representatives and nine or ten Republican Representatives. (As a result of the 2000 census, Michigan is now entitled to only fifteen congressional seats). Thus, based entirely on redrawing of district lines, the number of Democratic Representatives is likely to decrease by at least one-third.

15. In passing the Republican Plan, the Republicans deviated from the nonpartisan criteria they themselves had helped to establish when they passed the Congressional Redistricting Act of 1999, P.A. 221. Because they could not achieve their desired partisan ends consistent with these criteria, the Republicans "reinterpreted" these criteria in the legislation that included the Republican Plan. This "reinterpretation" violated the Michigan Constitution's mandate that no Act shall take effect immediately unless passed by a two-thirds vote of each house. Mich. Const. art. 4, § 27 ("No Act shall take effect until the expiration of 90 days from the end of the session at which it was passed, but the legislature may give immediate effect to acts by a two-thirds vote of the members elected to and serving in each house."). It also violated the rule against amendment by reference ("No law shall be revised, altered or amended by reference to its title only. The section or sections of the act altered or amended shall be re-enacted and published at length." Mich. Const. art. 4, § 25) and the "two subject rule" ("No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title." Mich. Const. art. 4, § 24). The Legislature's

willingness to violate the Michigan Constitution underscores the extent to which the Republican Plan was based on partisan considerations.

16. In 1999, the Republicans controlled both houses of the Michigan Legislature, as well as the governorship. As will be set forth below, however, the Republicans understood that Michigan was becoming increasingly Democratic and thus there was a significant chance that Democrats would control at least one legislative chamber at the time of redistricting in 2001. They therefore passed the Congressional Redistricting Act to limit the role of partisan considerations in redistricting. The Act established very specific criteria for congressional redistricting in addition to compliance with federal law. It prioritized those criteria and placed at the top of the priority list that "[e]ach congressional district shall consist of areas of convenient territory contiguous by land," and, after contiguity, that "[c]ongressional district lines shall break as few county boundaries as is reasonably possible." Mich. Comp. Laws § 3.63(c). The Act also provided, further down the priority list, that "[c]ongressional district lines shall break as few city and township boundaries as is reasonably possible." *Id.* The complete text of the statute is attached as Ex. A.

17. The Republican Plan violates these criteria by breaking ten county boundaries and fourteen city or township boundaries when it is "reasonably possible" to draw an alternative redistricting plan that breaks only five county boundaries and ten city or township boundaries. During the legislative session, Democrats introduced a plan that breaks only five county boundaries and ten city or county boundaries. This plan also does not pair in the same district any incumbents seeking reelection and more accurately reflects the political makeup of the State. (One Democratic incumbent intends to run for Governor, so only fifteen incumbents

– eight Democrats and seven Republicans – are seeking reelection.) Nonetheless, this alternative plan was defeated on the floor of the House on July 11, 2001, on a party-line vote (with the exception of one Republican who joined Democrats in supporting the plan).

18. In 1999, when the Legislature passed the Congressional Redistricting Act, it believed that this Act would bind the 2001 Legislature that would control redistricting. As explained above, the Michigan Constitution forbids implementation of legislation until 90 days after conclusion of a legislative session, in the absence of a two-thirds vote. Thus, without a two-thirds vote, the 2001 Legislature could not change the 1999 criteria for enacting a redistricting plan and immediately use those criteria as the basis for enacting a new redistricting plan. Even if the Legislature changed the criteria, the 1999 criteria would apply to 2001 redistricting efforts.

19. Nonetheless, because the Republican Plan clearly violates the statutory criteria set forth in the Congressional Redistricting Act, the 2001 Legislature redefined those criteria under the guise of interpretation. The legislation that includes the Republican Plan first states that "[i]t is the intention of the Legislature to comply fully with section 3 of the Congressional Redistricting Act, 1999 P.A. 221, MCL 3.63," which requires congressional district lines to break as few county boundaries (and as few city or township boundaries) as possible. But it then defines the number of county breaks in the redistricting plan as follows:

> (i) Breaking a county line means assigning part of the population of a county to 1 or more counties in the formation of a district.

(ii) If population is shifted from a county to a single election district, including a district from 2 geographically-separate areas, there is 1 break. Except as provided in subparagraph (iii), if population from a county is shifted to 2 or more election districts, there are 2 or more breaks.

(iii) If 1 part of a county is shifted to a district and the rest of the county is shifted to another district, there is 1 break.

To the extent they are comprehensible, these provisions appear to have been designed to justify the Republican Plan and thus must have been intended to govern the enactment of that very Plan. In other words, they were intended to have immediate effect. But the Republicans knew that they did not have the two-thirds majority needed for immediate implementation of the new criteria, and indeed, a Senate vote on whether the legislation should have immediate effect failed to garner the necessary two-thirds vote. The Republicans therefore attempted to circumvent the constitutional requirement for such a two-thirds vote by labeling the new statutory criteria as merely an "interpretation" of existing criteria. Yet the new provisions do not merely interpret the 1999 Act's redistricting criteria; they completely change them and thus required a two-thirds vote that they did not receive. The new redistricting criteria were therefore not in effect when the Republicans enacted the Republican Plan. The 1999 criteria were controlling.

20. The Republicans' willingness to deviate from the nonpartisan redistricting criteria they enacted in 1999 and to circumvent the Michigan Constitution in the process demonstrate that partisanship was the dominant motivation for the Republican Plan. This is also shown by the Republicans' willingness to violate the constitution in other ways. Passage of new redistricting criteria in the same legislation as a redistricting plan, without re-

publication of existing redistricting criteria, violates Michigan's constitutional rules against amendment by reference and inclusion of two subjects in the same law.

21. The partisan motivation for the Republican Plan is further emphasized by the manner in which that plan was shepherded through the Legislature with little opportunity for evaluation or for presentation of alternative plans. When the Michigan Legislature passed the Congressional Redistricting Act in 1999, it understood the importance of careful deliberation and public input during the redistricting process. It therefore provided that the Legislature "shall enact a redistricting plan for congressional districts" "[n]ot later than *November 1, 2001*." Mich. Comp. Laws § 3.62 (emphasis added). The November 1, 2001 deadline allowed seven months for careful deliberation after receipt of the 2000 census data (which, by federal law, must take place by April 1), while still ensuring that any courts reviewing the redistricting plan would have sufficient time to consider that plan and devise an alternative, if necessary, before the 2002 congressional election cycle gets underway.

22. Michigan law further emphasizes the importance of deliberation and public input in the redistricting process by building in a public comment period during the state judicial phase of the redistricting process. In particular, the law provides that in the event the Legislature is unable to agree on a redistricting plan, the Michigan Supreme Court shall propose a plan for public consideration and "make that plan available for public inspection at least 30 days before the time set for [a] hearing." Mich. Comp. Laws § 3.74.

23. Federal law also requires a deliberative process. The Voting Rights Act of 1965 prohibits enactment of any redistricting plan that would abridge the right to vote based on race or ethnicity.

In reviewing a Michigan redistricting plan under the Voting Rights Act, the Justice Department (or the District Court for the District of Columbia) will consider the "extent to which the [Michigan Legislature] followed objective guidelines and fair and conventional procedures" in enacting the new map, the "extent to which the [Legislature] afforded members of racial and language minority groups an opportunity to participate" in the decision-making process, and the "extent to which the [Legislature] took the concerns of members of racial and language minority groups into account." 28 C.F.R. § 51.57. A process that departs from normal legislative procedures and excludes African-Americans and other minorities from full participation risks rejection by the Justice Department or D.C. District Court.

24. Initially, the Republicans appeared to understand the value that Michigan and federal law places on deliberation and public participation in the redistricting process. When the census data were released in March 2001, the Republican leadership of the Michigan Legislature announced a "framework for redistricting" that included "public hearings across Michigan this summer, with the goal of passing a redistricting plan in the fall." Press Release from the Office of Senate Majority leader Dan L. DeGrow, "Michigan 2000 Census Figures Released: New Legislative Districts to be Developed" (Mar. 28, 2001) (quoting Sen. DeGrow and Sen. Schuette). This schedule provided sufficient time for presentation of alternative plans and reasoned consideration of these plans while nonetheless ensuring that a redistricting plan could be adopted by the Legislature and upheld by the courts well before the congressional candidates would have to file for the 2002 congressional elections.

25. The Republican leadership later abandoned its proposal for a deliberative process, and instead announced on Friday, June 8, that "organizations and/or interested persons have until noon,

Monday, June 18 to submit prepared plans, voting data, or legal analyses relevant to legislative and congressional redistricting." Press Release from the Office of Senate Majority Leader Dan L. DeGrow, "Legislative Redistricting Input Sought" (June 8, 2001) (quoting Sen. DeGrow and Sen. Schuette). The Senate Majority leadership later granted a one-week extension – until noon on June 25 – for submission of plans. Even with this additional week, there was still very little time for interested parties to engage in the complicated process of drawing maps and ensuring that they complied with all of the necessary legal requirements.

26. Not only did the Republican leadership provide little time for submission of alternative redistricting plans, it provided others little time for consideration of its own plan. When the Republicans first introduced a redistricting bill, on June 14, 2001, they introduced a shell bill that eliminated old congressional-district lines without proposing any new districts. *See* Senate Bill 546 (as introduced, June 14, 2001). The bill was referred to the Committee on Reapportionment that same day.

27. The Republicans did not publicly release the Republican Plan until 1:00 p.m. on June 25, 2001 – *after* the artificial deadline established by the Senate Majority leadership for introduction of plans had expired. The Republicans introduced the plan on the afternoon of June 25 even though the map was likely available far earlier. The Republican staff person who drew the map testified to the Senate Reapportionment Committee that she did so before political data were loaded onto the State's redistricting computers. Since these data were loaded in April 2001, her testimony suggests that she drew the map at least two months before it was publicly released.

28. On June 25, the Senate Committee on Reapportionment held the first and only hearing at which it discussed specific

congressional maps, and it was at this hearing that the Republicans introduced the Republican Plan. The Committee ensured there would be little public participation at this hearing by waiting until the afternoon of Friday June 22 to call the hearing. As a result, the only public participant at the hearing was the Executive Director of the Detroit Chapter of the National Association for the Advancement of Colored People ("NAACP").

29. The Republicans further limited public participation – and analysis of the Republican Plan by the public or by Democrats – through the manner in which they presented the bill. The bill did not include a pictorial representation of the proposed districts. Instead, the bill consisted of a list of counties, cities, and or townships in each district. When only part of a city or township was included in a district, the bill designated the included areas based on the six-digit census-tract numbers and four-digit census-block numbers of those areas. The bill was 167 pages long. Thus, the exact boundaries of each district could only be determined by analyzing thousands of census tract and block numbers – a task that is virtually impossible without a computer.

30. The Senate Republicans refused to provide the proposed map in electronic form even after they were asked to do so. Thus, before the map could be analyzed, the thousands of block numbers had to be manually entered into a computer. Not surprisingly, the Republicans' desire to preclude Democrats and the public from readily analyzing the Republican Plan, and their resultant unwillingness to provide the map in electronic form, resulted in a major mistake that was not discovered until after both the Senate and House had already passed the Plan, as is set forth below. In other states, it is routine practice for maps to be provided in electronic form to legislators from both political parties – and even to be placed on the World Wide Web for public inspection.

31. The NAACP asked for a 30-day extension to evaluate the map. This request was rejected.

32. The Committee voted in favor of the plan on June 25, 2001, and the full Senate voted to pass the proposed plan on June 26, 2001. Thus, the Senate passed the Republican Plan only a day after it was first introduced. Both in committee and on the floor, votes divided perfectly along party lines, with Republicans voting in favor and Democrats in opposition.

33. The bill moved to the House, where the Committee on Redistricting and Elections met on July 10, 2001, to consider the Senate plan. The House had only one day to consider the plan and reach an agreement with the Senate, as the legislative session was scheduled to end on July 11, 2001. Committee hearings and floor debate were minimal. The Committee heard limited testimony at its July 10 hearing, all of it in opposition to the Republican Plan, but it summarily ignored this testimony. The Committee Chair also summarily dismissed the questions of Democratic committee members on the plan, by either indicating that he did not know the answers to the questions or stating that the members should obtain the answers from Democratic staff. At roughly 11:00 p.m. on July 10, the Committee voted to approve the Republican Plan on a straight-party line vote.

34. The full House considered the Republican Plan well after midnight on the morning of July 11, 2001 – not a time when public scrutiny or rigorous debate was likely to occur. At roughly 2:35 a.m., the House passed the plan on a straight party-line vote (with the exception of one Republican who joined the Democrats because the Republican Plan diluted the political influence of Dearborn's growing Arab-American population) after first rejecting two Democratic alternatives (with the same Republican again the only Representative to break party lines).

35. Later on July 11, the House asked the Senate to return the redistricting bill because it contained a blatant error. The Fifteenth Congressional District was noncontiguous: To traverse it, one would have to leave the Fifteenth and enter the Seventh Congressional District. Thus, the plan passed by both houses violated the *highest*-priority state criterion under the 1999 Congressional Redistricting Act. Democrats and members of the public did not catch the error prior to passage because the Republicans rushed the bill through the Legislature and refused to provide an electronic version of their map. Republicans did not catch the error because they were concerned predominantly with the partisan implications of the Republican Plan and apparently never even analyzed the Plan carefully to determine its compliance with the 1999 Act.

36. When the bill containing the Republican plan was returned to it on July 11, the House amended the bill to make the Fifteenth District contiguous, again passed the bill along party lines (with the same lone Republican dissenter) and returned it to the Senate. The Senate then passed the amended bill, again dividing perfectly along party lines.

37. The bill contained another blatant error, however. Four thousand people were not placed into *any* district in the bill. Thus, the bill plainly violated the principle of one person, one vote. (The state legislative redistricting plan contained a similar but lesser error – one unpopulated census tract was not placed in any district). Once again, no legislators caught this error because of the rush to enact the Republican Plan. By the time this error became apparent, the Legislature was out of session and was not scheduled to return until September.

38. Senate Secretary Carol Viventi was therefore faced with a choice: presenting the Republican Plan to the Governor despite the

blatant error, correcting the error herself, or waiting until the Legislature returned in September and sending the bill back to the Legislature for amendment. Sending the bill back to the Legislature, however, would have opened up the possibility of further debate on the Republican Plan. The Republican leadership and Governor Engler did not wish to open up any such possibility.

39. After a series of meetings with Republican leaders, Secretary Viventi concluded that she had the authority to correct the Republican Plan herself under Joint Rule 12 . That rule states that, "[i]f errors are found in a bill which has been passed by both Houses, the House in which the bill originated may make amendments to correct the errors and shall notify the other House of its action. If the corrective amendments are agreed to by the other House, the corrected bill shall be referred for enrollment printing and presentation to the Governor." Secretary Viventi apparently concluded that this Rule gave her authority to add four thousand people to a congressional district without the approval of either House because the correction was merely "technical" in nature. (In contrast, the Clerk of the House, who controlled presentment of the state legislative redistricting plan to the Governor, apparently concluded that Rule 12 did not provide him authority to correct the similar – but lesser – problem with the state legislative redistricting plan and did not correct that plan.)

40. On September 6, nearly two months after passage of the Republican Plan, Secretary Viventi corrected the Plan and presented it to the Governor. The Governor signed the bill containing the Republican Plan on September 11, 2001. If Secretary Viventi had waited only a couple more weeks, she could have returned the bill to the Legislature to correct the Plan itself.

41. Thus, the Republicans short-circuited the deliberative process. The passage of a plan containing two blatant and

fundamental errors demonstrates how little deliberation occurred and shows that members voted on a bill the contents of which they cannot have understood. This is further underscored by the unwillingness of Republicans to open up the plan for further deliberation by correcting it through the ordinary legislative process. The Republicans passed the Plan because they had already agreed internally on that plan and felt no need for input from Democrats or from the public. In fact, Republicans repeatedly made clear in press reports that they intended to use their control of the state legislature and governorship to pass a redistricting plan aimed to benefit Republicans. That is what they did.

42. Similarly, while Democratic senatorial candidate Debbie Stabenow won the U.S. Senate race in 2000 with just over half of the major-party statewide vote, she would have carried only five of the fifteen congressional districts under the Republican Plan – not surprisingly, the same five districts that Al Gore would have carried. In contrast, she would have carried nine out of sixteen districts under the 1992 Plan – a result consistent with her narrow victory statewide.

43. The partisan nature of the Republican Plan is also reflected in the pairing of current incumbents. While all seven Republican incumbents reside in separate districts under the Republican Plan, six of the nine Democratic incumbents are paired against each other. Congressman John Dingell of Dearborn and Congresswoman Lynn Rivers of Ann Arbor both reside in the new Fifteenth District. Congressman Dale Kildee of Flint and Congressman James Barcia of Bay City both reside in the new Fifth District. And Congressman David Bonior of Mount Clemens and Congressman Sander Levin of Royal Oak both reside in the new Twelfth District. (Congressman Bonior has announced his intention to retire from Congress and run for Governor.)

44. Thus, although there are currently nine Democratic incumbents and seven Republican incumbents, under the Republican Plan only six districts contain the homes of Democratic incumbents. Seven districts contain the home of Republican incumbents. Two districts (the Tenth and the Eleventh) contain the homes of no incumbents – an odd result in a State that is losing one congressional seat to reapportionment.

45. In contrast, two nonpartisan plans introduced by the Democrats in the Michigan Legislature pair fewer incumbents, more accurately reflect the political makeup of the State, and better accord with the nonpartisan criteria set forth in the 1999 Congressional Redistricting Act. The first plan, offered on the floor of the Michigan House as the Kilpatrick substitute, breaks only five county boundaries, far fewer than the ten boundaries broken in the Republican Plan. It also pairs only two incumbents. Democrat David Bonior, who plans to retire from Congress, is paired with Republican Joe Knollenberg in a Republican-leaning district. Finally, it accurately reflects the makeup of the State's electorate. Al Gore, who carried Michigan by roughly 5 percentage points, would have won 53.3% of the districts under this plan (in contrast to 33.3% under the Republican Plan). Nonetheless, on July 11, 2001, the House rejected this plan on a straight party-line vote (with the exception of a single Republican who joined Democrats in supporting the plan).

46. The Democrats introduced a second redistricting plan that accords with the Republicans' bizarre reinterpretation of the 1999 Act. This plan breaks the same number of county boundaries as the Republican Plan, using the Republicans' unique method of counting. This plan is not partisan, however. It pairs four incumbents – two Democrats in one district and two Republicans in another – in contrast to the six Democrats and zero Republicans

paired in the Republican Plan. It also more accurately reflects the political makeup of the State. Al Gore would have carried 46.7% of the districts (7 out of 15) under this plan. The House also rejected this plan on a straight party-line vote.

47. Thus, the Republicans rejected alternative plans and rammed through their own plan even though it deviated sharply from preexisting statutory criteria and required a significant revision of those criteria in violation of the Michigan Constitution. Clearly, partisan concerns predominated. As the Chairman of the House Redistricting and Election Committee Bruce Patterson explained to the *Detroit NEWS,* in April when asked if the Republicans intended to adopt a plan to create a 9-to-6 Republican majority, "If 9-6 is doable and within the rules, why wouldn't I go with that?" Mark Hornbeck & Charlie Cain, *Oakland Key to Redistricting*, DETROIT NEWS at A1, Wednesday, April 25, 2001. Indeed, the Republicans apparently believed that if 9-6, or 10-5, was "doable" they should go with that even if it was *not* within the rules.

48. In addition to its excessive partisanship, the Republican Plan also limits the power and influence of Michigan one million four hundred twelve thousand African-American citizens. Outside of Wayne County, blacks in Michigan would not reside in a majority-black district under any redistricting plan but they could still have significant impact on congressional elections. However, because blacks in Michigan tend to vote as a bloc and strongly favor Democrats and because whites in Michigan tend to vote as a bloc, blacks can only have significant impact on the nomination and election of a congressman or congresswoman if (1) they reside in a competitive or Democratic-leaning district, and (2) there is a relatively high concentration of blacks among Democratic primary voters.

49. Outside of Detroit, three of the cities with the highest number of blacks are Pontiac, Grand Rapids, and Lansing. Under the Republican Plan, each of these cities is placed in a strongly Republican district and also is isolated from other cities with a significant black population. Under the Democrats' plan, however, each of these three cities is placed in a competitive or Democratic-leaning district.

50. Finally, because blacks in Michigan vote overwhelmingly for Democrats in congressional elections, the substantial diminution in Democratic strength under the Republican Plan inherently dilutes the ability of black voters to participate in the political process and to elect candidates of their choice to Congress.

CLAIM I

51. Plaintiffs incorporate by reference Paragraphs 1 through 50.

52. The facts herein alleged constitute a denial or abridgement of each plaintiff's right to vote for his or her Representative to the United States Congress, in violation of Sections 2 and 4 of Article I of the United States Constitution, as amended by Section 2 of the Fourteenth Amendment.

CLAIM II

53. Plaintiffs incorporate by reference Paragraphs 1 through 50.

54. The facts herein alleged constitute a denial of the plaintiffs' freedoms of speech and association in violation of the First Amendment to the United States Constitution.

CLAIM III

55. Plaintiffs incorporate by reference Paragraphs 1 through 50.

56. The facts herein alleged constitute a denial to plaintiffs of the equal protection of the laws as guaranteed to them by the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution.

CLAIM IV

57. Plaintiffs incorporate by reference Paragraphs 1 through 50.

58. The facts herein alleged constitute an abridgment of the privileges and immunities of citizenship guaranteed to plaintiffs by the Privileges or Immunities Clause of Section 1 of the Fourteenth Amendment to the United States Constitution.

CLAIM V

59. Plaintiffs incorporate by reference Paragraphs 1 through 50.

60. The facts herein alleged constitute a denial or abridgement of the plaintiffs' right to vote as guaranteed to them by Section 1 of the Fifteenth Amendment to the United States Constitution.

CLAIM VI

61. Plaintiffs incorporate by reference Paragraphs 1 through 50.

62. The facts herein alleged constitute a deprivation of plaintiffs' constitutional rights that is actionable under Section 1983 of Title 42 of the United States Code.

Claim VII

63. Plaintiffs incorporate by reference Paragraphs 1 through 50.

64. The facts herein alleged constitute a denial or abridgement of the plaintiffs' right to vote as guaranteed them by Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this Court:

A. Assume jurisdiction of this matter and convene as a three-judge District Court pursuant to Section 2284 of Title 28 of the United States Code;

B. Set a deadline of April 1, 2002, pursuant to the principles of federalism and comity set forth in *Growe v. Emison*, 507 U.S. 25, 32-37 (1993), and consistent with the April 1, 2002, deadline established by Michigan law, Mich. Comp. Laws § 3.74(g), for the Michigan Supreme Court to adjudicate any challenges to the Michigan congressional redistricting plan.

C. If the Supreme Court of Michigan fails to adopt a new, legally valid congressional redistricting plan by that April 1, 2002 deadline, enter a declaratory judgment that the congressional districting plan that the Michigan Legislature enacted in July 2001 violates plaintiffs' rights under the aforesaid provisions of the United States Constitution and federal law;

D. Enjoin permanently the defendants, their officers, agents, employees, attorneys, successors in office, and all persons in active concert or participation with them, from conducting primary, general, or special elections using the 2001 congressional districting plan or any other congressional districting plan that violates the United States Constitution or federal law;

E. Impose by Court order a new congressional redistricting plan that meets the requirements the United States Constitution and federal and state law;

F. Grant plaintiffs their reasonable attorneys' fees, litigation expenses, and court costs; and

G. Grant plaintiffs any other relief that the Court finds appropriate and equitable.

Respectfully submitted,
BODMAN, LONGLEY & DAHLING LLP
By: /s/ WILLIAM B. FORREST

F. Thomas Lewand (P16619)
R. Craig Hupp (P36254)
William B. Forrest III (P60311)
100 Renaissance Center # 3400
Detroit, MI 48243
Attorneys for Plaintiffs

APPENDIX F

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 3. FEDERAL AND INTERSTATE RELATIONS
CONGRESSIONAL REDISTRICTING ACT

3.63. Guidelines and priorities; enactment of redistricting plans

Sec. 3. Except as otherwise required by federal law for congressional districts in this state, the redistricting plan shall be enacted using only these guidelines in the following order of priority:

(a) The constitutional guideline is that each congressional district shall achieve precise mathematical equality of population in each district.

(b) The federal statutory guidelines in no order of priority are as follows:

(i) Each congressional district shall be entitled to elect a single member.

(ii) Each congressional district shall not violate section 2 of title I of the voting rights act of 1965, Public Law 89-110, 42 U.S.C. 1973.

(c) The secondary guidelines in order of priority are as follows:

(i) Each congressional district shall consist of areas of convenient territory contiguous by land. Areas that meet only at points of adjoining corners are not contiguous.

(ii) Congressional district lines shall break as few county boundaries as is reasonably possible.

(iii) If it is necessary to break county lines to achieve equality of population between congressional districts as provided in subdivision (a), the number of people necessary to achieve population equality shall be shifted between the 2 districts affected by the shift.

(iv) Congressional district lines shall break as few city and township boundaries as is reasonably possible.

(v) If it is necessary to break city or township lines to achieve equality of population between congressional districts as provided in subdivision (a), the number of people necessary to achieve population equality shall be shifted between the 2 districts affected by the shift.

(vi) Within a city or township to which there is apportioned more than 1 congressional district, district lines shall be drawn to achieve the maximum compactness possible.

(vii) Compactness shall be determined by circumscribing each district within a circle of minimum radius and measuring the area, not part of the Great Lakes and not part of another state, inside the circle but not inside the district.

(viii) If a discontiguous township island exists within an incorporated city or discontiguous portions of townships are split by an incorporated city, the splitting of the township shall not be considered a split if any of the following circumstances exist:

(A) The city must be split to achieve equality of population between congressional districts as provided in

subdivision (a) and it is practicable to keep the township together within 1 district.

(B) A township island is contained within a whole city and a split of the city would be required to keep the township intact.

(C) The discontiguous portion of a township cannot be included in the same district with another portion of the same township without creating a noncontiguous district.

(ix) Each congressional district shall be numbered in a regular series, beginning with congressional district 1 in the northwest corner of the state and ending with the highest numbered district in the southeast corner of the state.

APPENDIX G

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 3. FEDERAL AND INTERSTATE RELATIONS
CONGRESSIONAL APPORTIONMENT

3.54. Redistricting plan guidelines, priorities, purposes

Sec. 4. All of the following apply to the redistricting plan in section 1:

(a) In adopting the redistricting plan for congressional districts, it is the intention of the legislature to comply fully with section 3 of the congressional redistricting act, 1999 PA 221, MCL 3.63.

(b) The number of county breaks in the redistricting plan is determined by the following principles:

(i) Breaking a county line means assigning part of the population of a county to 1 or more counties in the formation of a district.

(ii) If population is shifted from a county to a single election district, including a district from 2 geographically-separate areas, there is 1 break. Except as provided in subparagraph (iii), if population from a county is shifted to 2 or more election districts, there are 2 or more breaks.

(iii) If 1 part of a county is shifted to a district and the rest of the county is shifted to another district, there is 1 break.

(c) The redistricting plan was designed to comply fully with both section 2 of the voting rights act of 1965, Public Law 89-110, 42 U.S.C. 1973, and the requirements of the equal protection clause

of amendment XIV of the constitution of the United States, as set forth in Shaw v Reno, 509 US 630 (1993), and subsequent cases concerning racial gerrymandering. In light of these dual obligations, the plan avoids any practice or district lines that result in the denial of any racial or ethnic group's equal opportunity to elect a representative of its choice and, at the same time, does not subordinate traditional redistricting principles for the purpose of accomplishing a racial gerrymander or creating a majority-minority district. As a consequence, the plan does not result in retrogression or dilution of minority voting strength, particularly in light of the demographic limitations caused by relative population losses and the neutral criteria set forth in section 3 of the congressional redistricting act, 1999 PA 221, MCL 3.63. However, the plan does not sacrifice traditional neutral principles, such as, most importantly, preservation of county and municipal boundaries, for the purpose of engaging in a gerrymander that unnecessarily favors 1 racial group over others.

(d) The plan furthers the underlying purpose of the state constitution of 1963 by facilitating effective representation in the legislature where elected representatives can advance the shared interests of unified municipalities or counties. It does so without sacrificing voting rights act of 1965 principles, equal electoral opportunities, or racial fairness.

(e) The redistricting plan for congressional districts consists of 15 single member districts comprised of convenient territories contiguous by land. All of the following apply to the plan:

(i) The population in each of districts 1-9 and 11-15 is 662,563. The population of district 10 is 662,562.

(ii) The number of breaks in county boundaries is 11.

(iii) The number of breaks in city and township lines is 14.

(iv) No congressional district is wholly contained within a city.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PAT O'LEAR, DONALD RITTERING, KAY ANN CHASE, STEVE BORRELLO, LAWRENCE KESTENBAUM, JAMES LARKIN, BARBARA LONG, GEORGE GAINES, MINNIE H. WHITING, and CHRISTOPHER SMITH,

Plaintiffs,

v.

CANDICE S. MILLER, in her official capacity as Secretary of State for the State of Michigan, and CHRISTOPHER M. THOMAS, in his official capacity as Director of Elections for the State of Michigan,

Defendants,

and

THE MICHIGAN REPUBLICAN PARTY, PATRICK MILLER, ANDREW PETTRESS, and JAMES L. PALASKE,

Defendant-Intervenors.

Case No. 01-72584
Honorable Boyce F. Martin, Jr.
Honorable Julian Abele Cook, Jr.
Honorable David M. Lawson

ORDER

On April 18, 2002, the Defendants, Candice S. Miller, Secretary of State for the State of Michigan, and Christopher M. Thomas, Director of the Bureau of Elections, filed a motion in which they seek reconsideration of the Order of the Court on April 24, 2002, which *inter alia*, (1) extended the date for filing and processing the nominating petitions of potential candidates for the United States House of Representatives for the 2002 primary election from May 14, 2002 to June 11, 2002, and (2) set forth an expedited discovery and trial schedule. The Plaintiffs, Pat O'Lear, Donald Rittering, Kay Ann Chase, Steve Borrello, Lawrence Kestenbaum, James Larkin, Barbara Long, George Gaines, Minnie H. Whiting, and Christopher Smith, oppose this request.

The Local Rules of the Eastern District of Michigan, which set forth the standards to be applied by the Court when attempting to resolve motions for reconsideration, provide, in part, that the movant must (1) demonstrate a palpable defect by which the court and the parties have been misled and (2) show that a correction of the defect would result in a different disposition of the case. E.D. Mich. LR 7.1(g)(3).

In maintaining that a palpable defect exists in this challenged decision of April 24th to postpone the filing deadline and expedite the trial schedule, the Defendants submit that the Plaintiffs have failed to establish that they (1) are likely to succeed on the merits of their claims which challenge the validity of the 2001 Congressional Districting Plan, 2001 PA 115, and (2) will sustain an irreparable harm in the absence of some form of injunctive relief. (Defs.' Mem. Supp. Reconsideration at 18-25). Against these assertions, the Plaintiffs argue that the decision to postpone the May 14th filing deadline was reasonable in light of the complex issues in the instant action. Moreover, they maintain that, in the event that the Court decides to grant the Defendants' request, such a decision would be justified only if, upon a finding

that the redistricting scheme was unconstitutional, the Court immediately adopted a new remedial scheme at the conclusion of this trial. (Pls.' Opp. at 11).

It is well-settled in this Circuit that a court must consider four factors when deciding whether to issue a preliminary injunction. Namely, whether (1) the plaintiffs' have demonstrated a likelihood of success on the merits; (2) the granting of the injunction will prevent an irreparable injury; (3) the issuance of the injunction will harm others; and (4) the public interest will be served by the grant of injunctive relief. *Michigan Coalition of Radioactive Material Users v. Griepentrog,* 945 F.2d 150, 154 (6th Cir. 1991).

As an initial matter, the Defendants are correct in their assertion that the Court did not outline the reasons underlying its decision to postpone the May 14th filing deadline with any specificity. However, the Court is satisfied that its ultimate decision of April 24th relating to the postponement was correct under the existing circumstances. Specifically, the Court finds that (1) the Plaintiffs' allegations, as set forth in the pleadings, arguably support a finding at the early-stage of this litigation that they have a likelihood of success on the merits of their claim, or a portion thereof, of unconstitutional political gerrymandering, (2) the granting of injunctive relief will prevent an irreparable injury that would likely result if a potentially unconstitutional election is allowed to proceed unfettered, and (3) the collective interests of the parties and the public will be served by the brief postponement of an extension of the challenged filing date to June 11th in order to assure the preservation of the electoral process.

Thus, having reviewed the Defendants' motion, as well as the current record in the above- titled action, the Court is persuaded that its decision to postpone the May 14th deadline for

filing the nominating petitions of potential congressional candidates in the forthcoming primary elections until June 11, 2002, was the least intrusive means of ensuring fairness in the process, while simultaneously affording the Court with a full opportunity to resolve all of the contested issues in this case prior to the August 2002 election. Furthermore, the Court finds that granting the Defendants' requested relief would result in further harm to the State's electorate and unnecessary confusion.

Accordingly, the Court will deny the Defendants' motion for reconsideration for the reasons that have been set forth above.

IT IS SO ORDERED.

FOR AND ON BEHALF OF THE PANEL

/s/ DAVID M. LAWSON

DAVID M. LAWSON
United States District Judge

Dated: May 15, 2002

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PAT O'LEAR, DONALD RITTERING, KAY ANN CHASE, STEVE BORRELLO, LAWRENCE KESTENBAUM, JAMES LARKIN, BARBARA LONG, GEORGE GAINES, MINNIE H. WHITING, and CHRISTOPHER SMITH,

Plaintiffs,

v.

CANDICE S. MILLER, in her official capacity as Secretary of State for the State of Michigan, and CHRISTOPHER M. THOMAS, in his official capacity as Director of Elections for the State of Michigan,

Defendants,

and

THE MICHIGAN REPUBLICAN PARTY, PATRICK MILLER, ANDREW PETTRESS, and JAMES L. PALASKE,

Defendant-Intervenors.

Case No. 01-72584
Honorable Boyce F. Martin, Jr.
Honorable Julian Abele Cook, Jr.
Honorable David M. Lawson

NOTICE

On behalf of the three judge panel hearing in this case, please be advised that the hearing in this matter scheduled for Tuesday, May 21, 2002 at 1:00 p.m. has been cancelled;

The Panel also advises that decisions on the pending Motions to Dismiss in this matter will be issued on or before Friday, May 24, 2002.

For and on Behalf of the Panel:

/s/ DAVID J. WEAVER
David J. Weaver
Court Administrator/Clerk of Court

Dated: May 15, 2002

APPENDIX J

MICHIGAN SUPREME COURT

JANUARY 23, 2002

DAVID LEROUX, MICHAEL GRAY and ROBERT L. ELLIS,
Plaintiffs,

v

CANDICE S. MILLER, in her official capacity a Secretary of State for the State of Michigan, and CHRISTOPHER M. THOMAS, in his official capacity as Director of Elections for the State of Michigan,
Defendants,

SUZANNE L. ANDERSON, SHARON YENTSCH, and BRADLEY VAN HAITSMA,
Intervening Respondents.

Case Number 120338

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* * *

JUSTICE CORRIGAN: I have one follow-up question for you that came up in our previous study of this case.

The plaintiffs have claimed that their second alternative plan that the Democrats had introduced had 10 county breaks and 12 municipal breaks under the 2000 statutory definitions. I'm wondering if you accept that – what the intervenor's view of the second alternative plan is.

MR. ELLSWORTH: There is some disagreement among our clients with respect to the number of county breaks in that plan. I believe that it is a 10-break plan, and I believe that the 10-break figure [for county boundaries] and the 12-break figure [for municipal boundaries] is correct. . . .